

OPINIONS
OF THE
Corporation Counsel and
Assistants

FROM

April 16, 1925, to April 15, 1926.

[With Appendix Containing Opinions of Present Interest
Omitted from Previous Publication.]

VOLUME XIV

Compiled and Edited by
FRANCIS X. BUSCH
Corporation Counsel, City of Chicago

Published April 15, 1926.



CHAMPLIN LAW PRINTING COMPANY, CHICAGO



PREFACE.

In pursuance of the plan adopted two years ago of publishing each year a volume of opinions written by the Corporation Counsel and Assistants, so that each book may represent, in point of time, the principal advisory work of the Law Department for a fixed period, this volume is issued for the year extending from April 16, 1925, to April 15, 1926.

It was announced that with the completion of the last two volumes and the volume recently printed covering the years 1905-1907 substantially all opinions of present importance rendered by the department since 1872 were made available. When the index for these was being prepared, however, it was found that some had been omitted which are still of sufficient interest and present value to make their publication desirable. In order to bring these within the reach of the City Council and the heads of the various departments of the city, as well as to make them more accessible to the staff of the Corporation Counsel, we concluded to add them to this volume, and they appear at the end of the work as an appendix. A glance at the opinions contained in that part of this book will show that there is ample justification for doing this.

There have been published, up to the present time, thirteen volumes of selected Opinions of the Corporation Counsel and Assistants, covering the time from January 1, 1872, to April 15, 1925. An index to these thirteen volumes, printed as a separate book, was recently added. The publication of this series of books was not the result of a preconceived plan, and consequently no system of numbering the volumes was adopted. For obvious reasons it was not considered advisable to number them even when the index was printed. Since it is the purpose now to publish a new book each year, we believe it will tend to make the work as a whole more convenient for ready reference if future volumes are numbered. We have therefore designated this as Volume Fourteen, with

the intention of having future issues numbered successively after the thirteen already in print.

In all other respects the current work follows the general plan of the former books. The aim has been to select opinions which will be of value in the future rather than such as are concerned with matters that will not arise again. We have also, as far as possible, avoided duplication, although necessarily, with respect to opinions that treat of the same general subject-matter, reiteration cannot be entirely eliminated. It is to be hoped that the work will add to the value of the series heretofore completed.

FRANCIS X. BUSCH,
Corporation Counsel,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Chicago, April 15, 1926.

OPINIONS
OF THE
Corporation Counsel and
Assistants
FROM
APRIL 16, 1925, TO APRIL 15, 1926.

Maintenance of Commercial Sign in Apartment District Contrary to Zoning Ordinance.

April 16, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

You have advised this office that a sign is being maintained by the Illinois Life Insurance Company at 1212 Lake Shore drive, Chicago, which, in your opinion, is in violation of the Zoning Ordinance. You state that you have notified the Illinois Life Insurance Company to remove this sign, and that they have refused so to do. You have requested this office to render an opinion relative to whether the maintenance of this sign is in violation of the Zoning Ordinance.

The building occupied by the Illinois Life Insurance Company is located at 1212 Lake Shore drive in the City of Chicago. Except for the south seventy-eight or eighty feet of the block, it occupies all the block which lies south of Scott street west of Lake Shore drive, north of Division street and east of Stone street. The south half of the building was completed in May, 1922, and the north half of the building

was completed, except for some details, by January, 1923, and the company entered upon its occupancy at that time. When the Zoning Ordinance was passed, on April 5, 1923, the building was completed and was being occupied by the Illinois Life Insurance Company as its home office building. The building is three stories in height and is of the French Chateau type of architecture. A few weeks ago the company prepared a bronze sign about five feet in length, one and one-half feet high, and eight inches in depth, with electric lights on the inside. The front is of glass, and bears on it the words "Home Office, Illinois Life Insurance Company, Greatest Illinois Company." The building is located in the area which is zoned for apartment purposes.

It is the contention of the company that, since the building was occupied and in use by them at the time of the passage of the Zoning Ordinance, they are entitled to continue such a use, and as an incident to such use to erect the sign in question, by virtue of that section of the ordinance which provides for non-conforming uses. For the purpose of clarity, we are setting forth, in substance, the provisions of the ordinance relative to non-conforming uses:

"Section 14. Non-conforming Uses. (a) A non-conforming use existing at the time of the passage of this ordinance may be continued.

(b) A non-conforming use shall not be extended, but the extension of a use to any portion of a building which was arranged or designed for such non-conforming use at the time of the passage of this ordinance shall not be deemed the extension of a non-conforming use.

(c) A building other than an A3 use arranged, designed or devoted to a non-conforming use at the time of the passage of this ordinance may not be reconstructed or structurally altered to an extent exceeding in aggregate cost, during any ten-year period, 50 per cent of the value of the building, unless the use of such building is changed to a conforming use.

(d) A non-conforming A3 use may be enlarged or extended within the limitations of the volume district in which it is located.

(e) A non-conforming yard storage use shall not be expanded in area of storage space so used.

(f) A non-conforming advertising sign use if removed from the premises may not be replaced.

(g) A non-conforming use shall not be changed unless changed to a more restricted use; provided, however, that in a Residence district an M use shall not be changed unless changed to a conforming use.

(h) A non-conforming use if changed to a conforming use shall not thereafter be changed back to any non-conforming use.

(i) A non-conforming use if changed to a more restricted non-conforming use shall not thereafter be changed unless to a still more restricted use.

(j) In a Residence district an A1 use shall not be changed to an A2 use.

(k) In a Manufacturing district no existing M use shall be deemed to be non-conforming except where such M use is nearer at the time of the passage of this ordinance to a Residence or Apartment or Commercial district, as the case may be, than the minimum distance as prescribed by this ordinance.

(l) For the purposes of this ordinance a use shall be deemed to be changed if changed from a use included in a use class to a use not included in such class.

(m) A non-conforming use except as hereinbefore provided shall be deemed to be changed to a more restricted use if the use to which such non-conforming use is changed is a use included in a use class that in the arrangement of classes precedes the class in which such non-conforming use is included. The classes shall be deemed to be arranged in order of precedence as R, A, C1, C2, C3, M1, M2 and M3 as hereinbefore defined."

From a reading of the entire ordinance, and particularly of that section of the ordinance relative to non-conforming uses, it will be observed that the purpose and intention of the ordinance is to provide a *modus operandi*, whereby non-conforming uses will be gradually changed to conforming uses, thereby avoiding the hardship which would be incident to such a change were the change required to be made abruptly. The whole purpose of the section on non-conforming uses is to require the non-conforming use gradually to be shaded down until it becomes a conforming use. Thus, it is provided in Section 14 (f) that "a non-conforming advertising sign use if removed from the premises may not be replaced."

It is true, that it is the contention of the company that the use of the sign is a mere incident to their non-conforming use. Interpreting the ordinance according to the purpose and intention of the entire ordinance, we are unable to agree with this contention, and feel that this sign violates the very principle which this ordinance is attempting to maintain, in that the erection of the sign is an increase, rather than a diminishment of the non-conforming use. In this connection, it may be fitting to observe that the office of the Illinois Life Insurance Company is located in a most beautiful residential section on Lake Shore drive, and any large advertising sign, of necessity, greatly detracts from the appearance of the neighborhood.

We therefore advise you that you insist upon the removal of this sign.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Responsibilities of Commissioner of Public Works in
Regard to Condition of Channel of North Branch
of the Chicago River.**

April 16, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to the responsibility of the Commissioner of Public Works regarding the condition of the channel of the North Branch of the Chicago River lying with-

in the city limits has been referred to the undersigned for consideration and reply.

At the outset, it might be well to refer to the powers of the City of Chicago as delegated to it by the State of Illinois. In and by Section 1, Paragraph 65, Article V, Chapter 24, Illinois Revised Statutes, it is provided that the City Council in cities shall have the following powers:

“Thirtieth. To deepen, widen, dock, cover, wall, alter or change channel of water courses.

“Thirty-first. To construct and keep in repair canals and slips for the accommodation of commerce.

“Thirty-second. To erect and keep in repair public landing places, wharves, docks and levees.

“Thirty-third. To regulate and control the use of public and private landing places, wharves, docks and levees.

“Fortieth. To provide for the cleansing and purification of waters, water courses and canals, and the drainage or filling of ponds on private property, whenever necessary to prevent or abate nuisances.”

Section 1, Paragraph 1160, Article X, Chapter 24, Illinois Revised Statutes (Cahill, 1925), provides:

“That every city and village in this state shall have the right, power and authority, and such right, power and authority are hereby granted to acquire, own, construct, maintain and operate anywhere within the jurisdiction or limits of the city or village, or in, over and upon any public waters bordering thereon, harbors, canals, slips, wharves, docks, levees, piers, quay walls breakwaters and all appropriate harbor structures, facilities, connections and improvements. * * *”

Section 5, Paragraph 1164, of the above Act provides:

“Every such city and village shall also have the right, power and authority, and such right, power and authority are hereby granted to use, occupy or reclaim all such submerged lands under the public waters of the state within the limits or jurisdiction of, or bordering on such city or village, as may be necessary or appropriate for any of the purposes in this act enumerated * * * insofar as such right has not been exercised, at the time when such city or village by ordinance, as to lands therein parti-

cularly described, shall elect or determine to exercise such right, power or authority, and no person or private corporation shall at any time hereafter construct any harbor, canal, slip, wharf, dock, levee, pier, quay wall, breakwater or other harbor structure, facility, connection or improvement, and no corporation, * * * except as in this Act or under the terms of any other law of this state may be provided, shall hereafter construct a harbor, canal, slip, wharf, dock, levee, pier, quay wall, breakwater or other harbor structure, facility, connection or improvement over or upon such submerged lands within the limits or jurisdiction of any such city or village, or over or upon any public waters bordering thereon, without first securing the consent of the city council of such city or village."

Section 7, Paragraph 1166 of the foregoing Act provides:

"Every such city and village shall also have the right, power and authority, and such right, power and authority are hereby granted, to take possession of, use and occupy any and all artificially made or reclaimed land * * * within the limits of or jurisdiction of, or bordering on such city or village * * * when and insofar as said lands shall be declared by ordinance of such city or village particularly describing said lands to be necessary or appropriate as and for approaches to or connections with any harbor or harbor utility or apurtenance in this Act authorized, and to establish, widen, extend, grade, pave and otherwise improve such approaches or connections over and upon such artificially made or reclaimed lands and to vacate the same or any part thereof, and every such city or village shall have the right, power and authority to bring and maintain all necessary suits, actions or proceedings in its corporate name against any person or corporation, private, public or municipal, for the recovery of the possession of such artificially made or reclaimed lands, which lands, when so acquired, shall be held, used and occupied by such city or village subject to the conditions in this act provided."

Section 16, paragraph 1175 of the foregoing Act provides:

"Every city and village in this state shall have the right, power and authority, and the right, power and authority are hereby granted, to locate and establish dock

lines and harbor lines in the public waters or rivers within the limits or jurisdiction of, or bordering on such city or village."

In and by Section 1699 of Article III of The Chicago Municipal Code of 1922, it is recited that the City of Chicago, having elected to exercise its rights under the Act hereinbefore referred to for the purpose of carrying out the powers granted by said Act, the ordinance creates and establishes four harbor districts.

Section 1700 of the Chicago code above referred to provides:

"Harbor District No. 1 shall include all of the Chicago River, including the main stream from its mouth to the forks, and the north branch and the south branch to the city limits, including all the public waters and submerged lands within and under said river and its branches aforesaid. * * * "

Section 1690 of the said code provides:

"The harbor shall consist of the Chicago River and its branches to their respective sources and all slips adjacent to and connecting therewith. * * * The harbor as herein defined shall be subject to the control of the harbormaster, under the supervision and according to the directions of the commissioner of public works. * * * "

In and by Section 200, Paragraph 80, Chapter 42, Illinois Revised Statutes, it is provided:

"That all persons owning land in this state shall clean annually any and all brush, trees, logs and other impediments to the flow of water in the bed of any stream, however small, and extending from the top of one bank to the top of the opposite bank of any such stream, as far as any such stream shall run or border the land of any owner, and when any stream shall run between the lands of two or more owners, each party shall clean his part of such stream: provided, that the streams or runs less than 15 feet wide, and *the rivers of this state* shall not be included herein, and this Act shall not interfere with fencing, floodgates bridges, culverts, etc., etc."

Pursuant to the foregoing powers vested in the City of Chicago by the Legislature, the City has assumed control of and passed various ordinances relating to the physical features of the dock lines and channel of the Chicago River and its branches. The City has elected to exercise the powers thus conferred and has passed various ordinances creating and defining the harbor district lines and regulating the construction, maintenance, operation and repair of docks, wharves and levees, and by ordinance has given the supervision of the enforcement of such ordinances to the Department of Public Works, to be exercised through its officers designated in the ordinances.

The City having elected to exercise the powers thus conferred, necessarily has assumed a duty with respect to the exercise of such powers. In my opinion the statutes do not contemplate the exercise of the powers in question by any other agency after the exercise thereof has once been assumed by the City.

Such being the case, it is my opinion that the burden of caring for the physical condition of the north branch of the Chicago river, the enforcement of regulations relating to the placing of obstructions therein, and the maintenance of the channel thereof free of obstructions, in so far as the same lies within the corporate limits of the City of Chicago, is upon the Commissioner of Public Works.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Concurred in:

T. A. SHEEHAN,

Attorney for Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity for Frontage Consents for Junk Yard Abutting on Alley.

April 16, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir :

This will acknowledge receipt of your letter of March 9th. You state that the J. Slavin Scrap Iron & Metal Company claim that they have purchased the property at 2309 N. Robey street, and that they wish to use the same for the storage of junk and second-hand metal.

The premises where it is proposed to store this metal are on Robey street at the corner of the first alley south of Lister avenue. Lister avenue, you state, between North Robey street and Binzo street, (the next easterly intersecting street) is residential as defined in the ordinance.

You wish to be advised whether under Section 921 of The Chicago Municipal Code of 1922 frontage consents are required on Lister avenue, because of the fact that the premises of the proposed junk yard abut on the alley upon which are the rear entrances to the lots which front on the south side of Lister avenue.

When we come to the proper interpretation of the provisions of the various frontage consent ordinances, perplexing and difficult questions usually present themselves, and in the solution of these questions little help is to be obtained from reports of adjudicated cases in the law books, because of the fact that the decision in each case is based more or less upon the peculiar facts of the particular case, the phraseology of the frontage consent ordinance relied upon, etc.

In passing upon such question, therefore, we must endeavor to arrive at a reasonable interpretation of the ordinance and one that is in consonance with its general intent

and purpose. The purpose of frontage consent ordinances is manifestly to protect residence blocks from the encroachment of business which, while not necessarily nuisances *per se*, may be of such character that they become nuisances when conducted in particular localities and under certain conditions

From the facts in this particular case it appears that the premises on which it is proposed to maintain this junk yard do not front in any sense on Lister avenue. They do, however, abut upon the first alley south of Lister avenue, and the question presents itself as to the physical characteristics of this alley. On one side of the alley is the right of way of the Chicago & Northwestern Railroad and the proposed junk yard could hardly be said to be objectionable to that. On the other side of the alley (and the side upon which abut the premises of the proposed junk yard and upon which side are the rear entrances to the lots which front on the south side of Lister avenue) are several sheds, etc. The character of the improvements in said alley would seem to be such that there would be no reasonable basis for the requiring of frontage consents.

Section 921 of the Municipal Code, in so far as it is applicable to the present case, provides as follows:

“It shall be unlawful * * * to locate * * * on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes * * * any place for storing junk * * * without the written consent of a majority of the property owners according to frontage on both sides of such street or alley.”

A block as defined by Section 920 of the Municipal Code reads as follows:

“920. *Definition of word ‘block.’*) Whenever a provision is made in this chapter that frontage consents shall be obtained for the erection, construction, alteration, enlargement or maintenance of any building or structure in any block, the word ‘block,’ so used, shall not be held to mean a square, but shall be held to embrace only that

part of a street bounding the square, which lies between the two nearest intersecting streets, one on either side of the point at which such building or structure is to be erected, constructed, altered, enlarged or maintained, unless it shall be otherwise specifically provided."

The lot upon which it is proposed to locate this business abuts, I am advised, on North Robey street for about 75 feet and upon the alley for about 45 feet. The office of the business, I am told, is to be entered from Robey street, and there is to be an entrance to the junk yard on the alley which adjoins the right of way of the Chicago & Northwestern Railway Company.

Where premises so abut both upon a street and upon an alley as in this case, it is my belief that it is not the intent of the ordinance to apply to such cases the words "fronting on any * * * alley in the city in any block," etc. In such a situation, I think the premises should be regarded as fronting upon the street—in this case Robey street. The words "fronting on any alley * * * " in my opinion are intended to cover cases where it is sought to establish a business, which is to be regulated by Section 921, in the interior of a block, and where the premises front only upon an alley and not upon any street.

Where, however, premises front upon a street as is the case here, I feel that the street upon which the property fronts governs the situation, and if the block on Robey street in which this proposed yard is to be located comes within the purview of the ordinance as one which requires frontage consents, then frontage consents are necessary on Robey street. Further, concerning the securing of frontage consents in the block on Lister avenue between Robey street and Binzo street, I have grave doubts as to whether the premises upon which it is proposed to locate this junk yard are in the said Lister avenue block under the definition of a block given in Section 920 of the Chicago Municipal Code. The said premises I feel are in the North Robey street block as they front upon North Robey street.

In accordance with your request, I am expressing no opinion as to whether or not the proposed business comes within the classification of a junk yard under the ordinances, or upon any other question except the one herein upon which you specifically request an opinion.

Upon careful consideration of the matter I do not believe, in so far as any matter in relation thereto has been called to the attention of this department, that frontage consents are required on Lister avenue, because the proposed junk yard lot which fronts on North Robey street abuts upon the alley (South of Lister avenue) upon which are the rear entrances to the lots that front on Lister avenue.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Lawyer's Lien Claim on Judgment for Damages.

April 16, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to how to proceed so that the City's interests will be protected in the payment of a certain judgment heretofore entered in the case of *Edward J. Lennartz v. City of Chicago*, Superior Court Case No. 407960, in which you have been served with a notice of attorney's lien, has been referred to the undersigned for consideration and reply.

The notice of lien involved is as follows:

IN THE SUPERIOR COURT OF COOK COUNTY.

“State of Illinois, }
County of Cook. } ss.

Edward J. Lennartz, }
vs. } Gen. No. 407960
City of Chicago. }

To the City of Chicago and to Corporation Counsel of
the City of Chicago and Comptroller of the City of
Chicago:

You are hereby notified, according to statute in such case made and provided, in force July 1, 1909, that Hadrian Baker, agent for Edward J. Lennartz, has retained and employed me in the capacity of attorney at law as his attorney and as attorney for Edward J. Lennartz, to prosecute by suit at law or in chancery or in such other manner as may seem advisable, or to effect settlement of the claim of Edward J. Lennartz or his cause of action against you for damages due for lowering sidewalk of premises of said Edward J. Lennartz as set forth in said cause of action, and also that I now have and do hereby claim against you and also against any and all of the effects or avails of said claim or cause of action, whether liquidated or unliquidated, which now are or hereafter may be in your possession or under your control, a lien for the amount of my fees for services performed and to be performed under and by virtue of said retainer and employment; also that my interest in said claim or cause of action is as follows: Five Hundred Dollars as per written and verbal contracts with said Edward J. Lennartz in presence of Mr. Yarnell, and that shall hold you responsible for the amount of said fees; and further you are hereby requested and notified to make no settlement or attempted settlement of said claim or cause of action without satisfying my said claim for fees.

Witness my hand and seal this 4th day of March,
A. D. 1925.

John Hugh Lally,

Attorney for Edward J. Lennartz.

Per Hadrian H. Baker.”

The foregoing claim for lien is based on the following statute:

“Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly; That attorneys at law shall have a lien upon all claims, demands and causes of action, including all claims for unliquidated damages which may be placed in their hands by their clients for suit or collection, or upon which suit of action has been instituted, for the amount of any fee which may have been agreed upon by and between such attorneys and their clients, or, in the absence of such agreement, for a reasonable fee, for the services of such attorneys, rendered or to be rendered for their clients on account of such suits, claims, demands or causes of action: Provided, however, such attorney shall serve notice in writing upon the party against whom their clients may have such suits, claims or causes of action, claiming such lien and stating therein the interest they have in such suits, claims, demands or causes of action, and such lien shall attach to any verdict, judgment or decree entered and to any money or property which may be recovered, on account of such suits, claims, demands or causes of action, from and after the time of service of the aforesaid notice * * * ” Chapter 13, par. 13, Section 1, Revised Statutes, (Cahill) 1821, page 233.

The foregoing was declared to be a valid enactment in the cases of *Standidge v. Chicago Railways Company*, 254 Ill. 524, and *Burns v. Illinois Central Railroad Company*, 258 Ill. 202.

An attorney's lien is purely a creature of statute and the statute must be followed in order to establish it. Where notice has been duly served by an attorney, as provided by the Attorney's Lien Act, the attorney becomes a part owner of the

decree in favor of the client and stands in the same position as if the client had assigned him an interest in the decree.

Dreyfuss v. Freud, 209 Ill. App. 345.

An attorney who has complied with this statute is entitled to a lien for his services.

Berg v. Kawin & Co., 190 Ill. App. 62.

In the case of *Baker v. Baker*, 258 Ill. 418, the court, at page 421, said:

“By serving the notice claiming a lien the attorney in effect becomes a joint claimant with his client in any judgment or decree that may be rendered or in the proceeds of any settlement that may be made by the client, and to the extent of the amount of his fee has the same interest in such proceeds, judgment or decree as his client and is entitled to his pro rata share thereof. In short, when the notice claiming a lien is served on the defendant or debtor under this statute it has the effect of an assignment of an interest in any judgment or decree that may be rendered or in the proceeds of any settlement that may be made by the client, and is such an assignment that the defendant or debtor is bound to respect. This creates a new and a substantial right in favor of the attorney and divests the client of substantial rights that he theretofore possessed.”

In *Standidge v. Chicago Railways Company*, 254 Ill. 524, the court at page 534, said:

“Clearly it was the intention of the legislature to give attorneys a lien, from and after the service of notice on the defendant, which would protect them against any settlements that might thereafter be made, regardless of whether the suit had been commenced, was pending or had been finally determined by the rendition of a judgment. The money paid by appellant to appellee’s client in settlement of this claim was money ‘recovered’ within the meaning of the statute.”

The notice of lien above quoted is inartificially drawn and is subject to certain technical objections. It is however, in my opinion, sufficient in substance to charge the City with notice of the lien claim. Under such circumstances and in

order to protect the City's interests you should withhold payment of the sum of \$500.00 until such time as the rights of the lien claimant have been adjudicated or the notice of the lien withdrawn by the execution of a proper waiver thereof.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Concurred in:

T. A. SHEEHAN,
Attorney Board of Local Improvements.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Interpretation and Application of Building Ordinances Relating to Assembly Halls.

April 18, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of March 9th asking our advice as to the application of the building ordinances to assembly halls in school buildings.

You state that the scope and purpose of assembly halls in school buildings is gradually being extended; that plays, lectures and moving picture shows are given therein to which the public are admitted; and that, from the old style of school assembly hall containing an open elevated platform at one end of the room, the school assembly hall has developed so that it now contains a proscenium wall and a stage equipped with foot-lights upon which scenery is used.

Your problem is, briefly, whether the new character of school assembly hall must comply with the requirements of Class IVb buildings as such provisions may be applicable to the use to which such assembly hall is put.

It appears further from your letter that objection is raised to the requirement that the new type of school assembly halls comply with the provisions of Class IVb, and the claim is made that school assembly halls need comply only with requirements for Class VIII buildings, and may install stages, proscenium walls and other equipment to give shows not expressly forbidden in Class VIII provisions.

That the problem which confronts you is not a new one is shown by the fact that heretofore the same question has been presented to this department. November 24, 1915, the Corporation Counsel advised the Commissioner of Buildings as follows:

"You called attention to a letter from this department, under date of March 26, 1915, in which it is stated that assembly halls connected with schools do not come within Class IVb as defined in Section 300 of The Chicago Code of 1911, but are to be treated as coming within the provisions of Article XI of Chapter XV, said article being the one which defines the requirements for buildings of Class VIII. Your present inquiry is whether the said letter still stands as the opinion of this department.

"We see no reason for taking a different view at the present time than was taken by the law Department on the date mentioned, when said opinion was prepared by Mr. Cagney and approved by Corporation Counsel Beckwith.

"Section 300 of the code states specifically that it applies to buildings 'other than schools included in Class VIII.' This in itself would be sufficient to take such assembly halls out of that classification, but, above and beyond anything mentioned in Section 300, we find a large number of provisions in point in Article XI, which relates to such assembly halls. In Section 496 the floor levels, type of construction and seating capacity is provided for; the width of stairways is prescribed in Section 497; aisles are taken care of in Section 501; emergency

exits and exits signs are required under Sections 502 and 503; and other provisions relating to such assembly halls could be pointed out which appear in this article. It cannot be assumed that these details would have been set forth under the division of the chapter on buildings relating to buildings of Class VIII unless it was intended that such assembly halls were to be treated differently than the assembly halls mentioned as coming within the Classification known as Class IVb.

“Our conclusion, therefore, is that assembly halls in buildings of Class VIII cannot be regarded as Class IVb halls, but that they are controlled by the provisions in Article XI of the chapter on buildings, which relates to buildings used for school purposes.”

While the above-quoted opinion is based upon The Chicago Code of 1911, yet an examination of The Chicago Municipal Code of 1922 discloses that there have been no fundamental changes in the requirements of Class IVb buildings and Class VIII buildings. Section 515 of the 1922 Code, which sets forth the requirements for IVb buildings, states specifically the same as did Section 300 of the 1911 Code that it applies to buildings “other than schools included in Class VIII.”

Article XI of the 1922 Municipal Code, which sets forth the requirements for Class VIII buildings, contains some different and additional provisions as to assembly halls which were not contained in the 1911 Code.

For instance, Section 708 of the 1922 Code reads as follows:

“708. *Scenery—sliding curtains—screens.*) No curtains or scenery shall be used in any assembly hall, except only, that it shall be permissible to use a pair of sliding curtains hung on horizontal metal rods not over twelve feet above the floor of stage and portable screens set on the floor and not over eight feet high; provided, however, in assembly halls located on the first floor or ground floor of a fireproof building, it shall be permissible to use curtains hung from the ceiling or top of proscenium opening.”

The above Section 708 of the 1922 Code differs from Section 505 of the 1911 Code in that in certain cases it makes it permissible "to use curtains hung from the ceiling or top of proscenium opening."

Section 709 of the 1922 Code is an additional provision and one that is not contained in the 1911 Code. It reads as follows:

"709. MOVING PICTURE MACHINES.) Moving picture machines may be installed and used in assembly halls located on the first floor or ground floor of fireproof buildings of class VIII. When moving picture machines are so used they shall be located in booths constructed of fireproof materials with metal clad doors and a vent duct to the outside air having a cross sectional area of at least one hundred square inches."

In addition to the provisions relating to school assembly halls contained in Article XI of the 1911 Code, there are the added provisions among others above set forth in the 1922 Municipal Code relating to such assembly halls. "It cannot be assumed," as set forth in our opinion of November 24, 1915, "that these details would have been set forth under the division of the chapter on buildings relating to buildings of Class VIII unless it was intended that such assembly halls were to be treated differently than the assembly halls mentioned as coming within the classification known as Class IVb."

After a careful reconsideration and re-examination of the matter and in accord with the reasons therein given, we adhere to the former opinion of this department, which is that assembly halls in buildings of Class VIII cannot be regarded as Class IVb halls, but that they are controlled by Article XI of the chapter on Buildings in the Municipal Code of 1922 which relates to buildings used for school purposes.

You state in your letter "the ordinances regulating assembly halls in school buildings, it would seem, did not take into consideration this new type of assembly hall." While this may be true, yet as we view it, no requirements can

be made for assembly halls in school buildings other than those applicable thereto and as provided by Article XI of the chapter on Class VIII buildings in the Municipal Code of 1922 which relates to buildings used for school purposes, and the general provisions of the City ordinances concerning buildings as far as they may be applicable.

While as a matter of law the new type of school assembly halls you mentioned are not required to comply with the Class IVb provisions, nevertheless, the purpose and the aim of the various requirements of the building ordinances are to secure safety and protection for the public; and, if the new type of school assembly halls you describe would insure more safety and protection to the children and the public using such halls, provided the said new type of school assembly halls were required to comply with the provisions of Class IVb, it would be advisable, it seems to us, to have the ordinances amended accordingly.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right to Disability Benefits of Policeman Struck by Bolt Falling from Elevated Structure.

April 19, 1925.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND.

Gentlemen:

In reply to your inquiry as to the right of Timothy J. Quirk, in his application for disability benefit, the following is submitted:

The claim is made by Mr. Quirk that, while detailed on crossing duty at Randolph street and Fifth avenue (now Wells street), on April 24, 1911, he was struck by a bolt which fell from the elevated structure; that he was taken to the hospital where four stitches were taken in the neighborhood of the left eyelid; that later, Mr. Quirk developed deafness and stated that the deafness was due to that accident; that his deafness is such that he is unfit for ordinary police duty, but has been assigned to duty as a police messenger; that the Police Department now desires him to retire on pension on account of his deafness; that the physician for your Honorable Body has submitted a written report to the effect that the deafness of Mr. Quirk was not, in his opinion, due to the injury received in 1911; that copies of reports obtained from the office of the surgeon of police are to the same effect.

Disability is a question of fact, and is defined in the Act as

“A condition of physical or mental incapacity on the part of a policeman to perform the duties of his position in the service.”

It appears that Mr Quirk's position in the service has been that of a police messenger, and that he has become physically incapacitated to longer perform the duties of his position.

Section 45 of the Policemen's Annuity and Benefit Fund Act provides that, any policeman less than 57 years of age who shall become disabled subsequent to the first day in the month of January, 1922, *as the result of an injury incurred in the performance of an act or acts of duty*, shall have a right to receive duty disability benefit in accordance with the provisions of that section.

Section 46 of the Act provides that, any policeman less than 57 years of age who shall become disabled subsequent to the first day of the month of January, 1922, *as the result of any cause other than injury incurred in the performance of an act or acts of duty*, shall have a right to receive ordinary

disability benefit in accordance with the provisions of that section.

As to whether Mr. Quirk's disability is due to the injury he suffered in 1911, or is due to a cause other than injuries received in an act or acts of duty, is a question for your Honorable Body to determine.

I am of the opinion that Mr. Quirk, if he is less than 57 years of age, is entitled to be granted disability benefit under Section 45 or Section 46, according to the finding of your Honorable Body in connection with the cause of such disability.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel

Use of Frontage Consent Signatures Where Proposed Location Is Altered.

April 19, 1925.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your letter of the 23d instant.

From your communication it appears that Miss Fannie Rothschild made application to locate a filling station on the premises described as lots 2, 3, 4 and 5 in Steinhaus' Fullerton Avenue Subdivision in the east half, northeast quarter, Section 36-40-13, and known as 2433-2439 Fullerton avenue. However, not possessing sufficient frontage consents in order to procure a permit for the erection of a filling station upon

the above described lots, she subsequently changed her application to erect the aforesaid station upon lots 4 and 5 known as 2437-2439 Fullerton avenue, submitting in connection with this later application the frontage consents obtained when it was her intention to locate the filling station on lots 2, 3, 4 and 5. You further advise that your department filed the frontage consents originally obtained by her and credited them on the later application; that the Superintendent of Maps certified that there was a surplus frontage and that therefore applicant was entitled to a permit, and that a permit was issued permitting the erection of the filling station on lots 4 and 5, otherwise known as 2437-2439 Fullerton avenue.

The question you present is whether the frontage consents originally submitted to you for a filling station at 2433-2439 Fullerton avenue could be used for a filling station at 2437-2439 Fullerton avenue. The petition presented to your department to locate tanks for the sale or storage of oils, which is now before us, reads as follows:

“The undersigned applicant herewith presents the assent of property owners as required by ordinance, and respectfully petitions for permission to locate tanks on property owned and controlled by him and *known as* (here the street and number are inserted) and described as follows: (here the legal description is given.)”

Our view of the matter is that when the applicant presented his petition for the assent of property owners to the installation of the oil filling station, they definitely acquiesced to the construction or location upon certain known and stated premises and upon no other. The applicant should not be permitted to hold out to property owners his intention to do a thing stated and certain and then, without their knowledge or agreement, change his plans. Therefore, when it became evident to the applicant herein that she could not obtain sufficient frontage consents to locate the filling station on the premises known as 2433-2439 Fullerton avenue, it was her legal duty to file an entirely new application and secure a new petition sufficient under the ordinances.

As we have often stated, the purpose of the frontage consent ordinances are to protect the value and stability of surrounding property; that if owners of adjacent and contiguous property desire to waive obligations, created by ordinance for their benefit and security, they may do so.

We do not think it is proper to credit on the frontage for lots 2 and 3 the frontage consents obtained for lots 2, 3, 4 and 5 as was done in this case, as the two applications relate to ventures that may be entirely different in their size, scope and proportion.

It is our belief that in this case a new frontage consent petition should be obtained to locate the filling station at 2437-2439 Fullerton avenue in accordance with the ordinances governing this subject-matter.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Covered Passageway Connecting Commercial Building with Elevated Structure in Loop.

April 19, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We beg to reply herein to your recent letter transmitting the joint application of the Chicago Rapid Transit Company and the Hartman Furniture and Carpet Company for a permit to construct a covered overhead passageway in South Wabash avenue connecting one of the platforms of the elevated railroad station at East Adams street with the second

floor of the building now being constructed adjacent to said station and to be occupied by said Hartman Furniture and Carpet Company as lessees. The request states that it is the intention of said companies to locate and maintain in said building an inner station and waiting room for the use of persons desiring to become passengers on the elevated railroad and that the purpose of said proposed passageway or bridge is to connect said inner station and waiting room with the exterior platforms of the elevated railroad station.

The elevated railroad station at East Adams street and South Wabash avenue was constructed and is maintained under the authority of an ordinance passed by the City Council October 14, 1895, and accepted October 21, 1895, by the grantee therein named, *i. e.*, the Union Elevated Railroad Company, to the rights and authority of which the Chicago Rapid Transit Company claims to have succeeded. Said ordinance of October 14, 1895, contains the following provisions relative to the construction and maintenance of elevated railroad stations:

“Section 4. The Union Elevated Railroad Company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain in the route hereby authorized, all necessary or proper stations, platforms and depot stations, and to connect the same with Wabash avenue, by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed and maintained as not to unnecessarily impair the usefulness of such avenue, or any portion thereof. Neat and commodious passenger stations of easy and convenient access shall be provided. * * * The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs leading to and from the sidewalks of the street and avenue, and the said elevated stations, being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary. Nothing herein contained, however, shall prohibit said company from locat-

ing and maintaining its stations in buildings which it may purchase, lease or erect on grounds purchased or acquired by condemnation or lease, wherein it may for the convenience and comfort of its patrons place its ticket offices, waiting rooms, sanitary accommodations, stairways, elevators and all requisite methods of ingress or egress, and the right to construct and maintain covered passageways or connections between the interior of all such station buildings and the exterior platforms is hereby expressly granted to said company. All of said supporting columns, cross girders, longitudinal girders, platform connections and hand railings shall be painted, and slightly appearance shall be maintained at all times. The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the commissioner of public works before the work of construction thereof shall have commenced."

For many years an inner station and waiting room has been maintained by the elevated company in the store owned and controlled by Carson, Pirie, Scott and Company adjacent to the Madison street station on the same elevated railroad. An overhead passageway connects this inner station and waiting room with the exterior platforms of the elevated railroad in a manner similar to that desired to be constructed in this case. The station in the store of Carson, Pirie, Scott and Company was constructed shortly after the railroad itself was constructed and is a strong indication of the construction placed upon the ordinance by the City and by the railroad company contemporaneously to the enactment of the ordinance and the construction of the line of railroad authorized by it.

Since the passage and acceptance of the contract ordinance of October 14, 1895, the following sections have been enacted and are now a part of The Chicago Municipal Code of 1922:

"3744. Bridges over streets connected with elevated railroad structure.) The construction of passageways, bridges, platforms and structures of any kind or nature whatsoever, extending over any public street or sidewalk and connecting and joining any elevated railway or station in the city with any building or buildings on prop-

erty adjacent to or fronting on any such elevated road, is hereby declared to be a public nuisance.

“3745. Removal.) All passageways, bridges, platforms and structures of every kind and nature designated in the preceding section and heretofore erected, or now in process of erection, shall be forthwith torn down and removed, and no such structure of any kind or nature shall be permitted to be built or erected in the future.

“The commissioner of public works is hereby ordered and directed to remove and take down, or cause to be removed and taken down, forthwith, all such structures, and he is further ordered and directed to prevent the erection or maintenance of any such structure in the future.”

Said sections of the Code of 1922 are identical with Sections 2458-2459 of the Code of 1911, and Sections 2145-2146 of the Code of 1905, and except for slight rearrangement of the phrases, which rearrangement makes no change in meaning, said sections are identical with the terms and provisions of an ordinance passed by the City Council on December 13, 1897. Said ordinance of December 13, 1897, was the origin of such provision of overhead passageways which becoming a part of the Code of 1905, has since been continued into the present Code as above described.

However, in the case of *Rothschild v. City of Chicago*, 227 Ill. 205, the Supreme Court of Illinois held that the ordinance of December 13, 1897, from which have come the provisions now contained in the Municipal Code, did not affect the rights of the companies as contained in contract ordinances passed and accepted prior to the enactment of the said ordinance of December 13, 1897.

We are therefore of the opinion that the Commissioner of Public Works has authority to grant permits for the building of said overhead covered passageway subject to the discretion over the issuance of said permits invested in the Commissioner by the terms and provisions of the ordinance of October 14, 1895.

It will be remembered, however, that the City Council has never recognized the claim of the Chicago Rapid Transit Company to succeed to the rights and privileges heretofore belonging to the underlying elevated railroad companies, including the Union Elevated Railroad Company. Any permit granted, therefore, should be subject to the reservations suggested in our opinion to the Commissioner of Public Works dated May 21, 1924, in rebuilding of new stairways at the Adams street elevated station and at the Addison street elevated station.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Pension Rights of Bridget Burke, Widow of Police Patrolman.

April 20, 1925.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND.

Gentlemen:

In reply to your letter of April 2, 1925, as to the pension rights of Bridget Burke, widow of Patrick Burke, deceased policeman, the following is submitted:

I.

The records of the Policemen's Annuity and Benefit Fund show that Patrick Burke was appointed in the Fire Department on October 7, 1879, and resigned therefrom

March 31, 1883; that he was appointed patrol driver October 6, 1897, and worked as such until the date of his death, January 15, 1911. The pension rights of Bridget Burke, widow of Patrick Burke, are therefore fixed by the law of 1887, as amended.

II.

The Police Pension Act of 1887, Paragraph 6, grants a pension, not to exceed one-half the amount of salary of the deceased policeman, to the widow of any member of the police force who shall die after ten years' service therein and while still in the service of such city. This provision was not changed by any subsequent amendments of the Act prior to the death of Patrick Burke, so that if Patrick Burke was a policeman and entitled to credits for his period of service in the Police Department, which credit amounted to 13 years and 3 months, then his widow would be entitled to a pension in accordance with the provisions of the Act of 1887.

III.

In February, 1921, the Supreme Court of the State of Illinois, in the case of *The People ex rel. Meehan v. Foreman, et al.*, 296 Ill. 487, in passing on the various sections of the Act of 1887, held that Section 6, hereinabove referred to, included every member of the police force, and held further, that a police force consisted of various classes of people who rendered services in the Police Department as members of a police force. In this case, the Supreme Court held that the Police Pension Fund Act of 1887 included every member of the police force who was duly appointed and sworn, regardless of the nature of the service.

In 1915, the legislature passed a Pension Act which superseded the Act of 1887, and in which the word "policeman" was defined so as to include police patrol drivers. In passing on this particular piece of legislation, the Supreme Court, in the case above cited, held that the construction

given to the word "policeman" under the Act of 1915, was not, and did not purport to be, the creation of any new right, but only a settlement of the question as to what the legislature meant to include in the term "policeman"; that the same reasonable conclusion appeared to be that the legislature's intention was "to give a definition or interpretation of the word 'policeman' as used in the series of Acts constituting the legislation on the same subject."

I V .

In view of the above holding of the Supreme Court, I am of the opinion that Patrick Burke was a policeman within the intent of Section 6 of the Act of 1887; that upon his death, if such death occurred while he was still in police service, his widow, Bridget Burke, became entitled to a pension in an amount not to exceed one-half the salary of the rank held by Patrick Burke at the time of his death, which salary was then \$1,000; and that such pension, from and after July 1, 1917, was governed by the provision of Section 5 of the Act of 1917 to the effect that the pension of any widow "now receiving a pension, or entitled thereto," shall not be less than \$600 per annum.

I am of the further opinion that the application of Mrs. Burke for pension should be allowed her in the sum of \$50 per month.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Pension Rights of Play Ground Directors.

April 21, 1925.

THE RETIREMENT BOARD, Municipal Employes Annuity & Benefit Fund.

Gentlemen :

In reply to your letter of March 23, 1925, relative to the pension rights of play ground directors, I submit the following :

The letter of Mr. J. Mock, President of the Play Ground Directors' Association, which was attached to your communication, states that prior to October 15, 1921, all the directors, assistants and physical instructors of the play grounds adjacent to the public schools, were employed by the Bureau of Parks and Play Grounds under the Civil Service Act; that during June, 1921, the Legislature passed a law transferring all these employes with the grounds to the Board of Education of the City of Chicago, the transfer to take effect October 15, 1921; that said employes were then temporarily certified as teachers of play grounds and physical education; that on February 14 and February 15, 1922, an examination was held for these employes, with the exception of the attendants (who retained their civil service standing) and were given teachers' certificates; that a majority of the play ground instructors have been in the service of the City of Chicago as play ground directors for periods varying from nine years to eighteen years; that 37 civil service employes were affected by said transfer; that after being transferred to the Board of Education the said employes were dropped from the Municipal Employes Pension Fund and required to pay into the Teachers' Pension Fund by action of the School Board; that it is the desire of these former civil service employes to retain their standing with the Municipal Employes Annuity & Benefit Fund, but payments were refused by the

latter fund; that the said employes desire to retain their civil service rights, although employed under the Board of Education and to continue to pay into the Municipal Employes Annuity & Benefit Fund.

I find no power given to your Honorable Body in any provision of the Act under which your Honorable Body is created which gives to your Honorable Body the power to accept payments from, and to enroll as a beneficiary of the Municipal Employes Annuity & Benefit Fund, any person not embraced within Section 1 of said Act, namely, municipal employes employed by the City of Chicago and municipal employes employed by the Board of Education of the City of Chicago, and of the widows and children of such municipal employes, and of all contributors to, participants in and beneficiaries of, any Municipal Pension Fund in operation in the City of Chicago at the time the present Act came into force and effect, having in mind that the term "Municipal Employe" is given a specific definition in the Act.

Under the statement of facts given me, it appears that when the directors and physical instructors in question were by the Legislature transferred to the Board of Education and became beneficiaries of the Teachers' Pension Fund in October, 1921, they ceased to be entitled to the benefits of the Municipal Employes Annuity & Benefit Fund Act.

I am informed by the Secretary of the Civil Service Commission that the municipal employes who were transferred to the Board of Education have been placed and retained on the civil service reinstatement list and are eligible to reappointment whenever the Board of Education transfers them back to the city, or reclassifies them as municipal employes.

The Teachers' Pension Act provides that all persons who shall be employed as teachers by the Board of Education shall by such employment accept the provisions of the Teachers' Pension Act and thereupon become contributors to the Teachers' Pension Fund. If this provision were amended so as to provide that those who were beneficiaries under any other pension fund could have the option, upon becoming teachers,

of continuing their contributions to such pension fund, or of becoming beneficiaries under the teachers' fund, the apparent deprivation of service credits of play ground directors, so far as regards their pension rights, could be remedied.

I am of the opinion that only legislative enactment or judicial decree could empower your Honorable Body to now enroll the play ground directors, assistants and physical instructors in question as beneficiaries of the Municipal Employes Annuity & Benefit Fund.

Very truly yours,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Time Limit on Permit for Installation of Gasoline Tank.

April 21, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have called our attention to the fact that the printed forms for permits for the installation of tanks for gasoline filling stations provide that:

“The work herein provided for shall commence within ninety days from date hereof, and shall be done under the supervision and inspection of the Bureau of Fire Prevention and subject to approval; otherwise this permit shall be null and void.”

You desire to know whether you are justified in declaring such a permit null and void if the licensee does not commence work within the ninety day period. We are of the opinion that you clearly have the right, in your permit, to limit the time in which work must be commenced to ninety days, in view of the fact that the ordinance requires frontage consents and that the ownership of property may change from time to time. Therefore, you are justified in notifying the holder of any permit that his permit is revoked and has become null and void whenever any such person does not commence work within ninety days from the issuance of the permit.

You also desire to know whether the person to whom such a permit has been issued may transfer such permit. The ordinance relative to the issuance of permits for tanks containing inflammable liquids provides in Section 2279(c) as follows:

“No permit issued under the terms of this section shall be transferred or assigned nor shall any right or privilege thereunder be transferred or assigned without the written consent of the commissioner of public works or the chief of fire prevention and public safety, as the case may be, and any permit may be revoked by the mayor at any time for cause.”

Under the above quoted portion of the ordinance, no permit may be transferred without the consent of the Chief of the Bureau of Fire Prevention and Public Safety.

Respectfully submitted,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Frontage Consents for Storage of Inflammable Liquids in Connection with Garage.

April 21, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested an opinion as to whether the ordinances require frontage consents to be obtained for the storage of inflammable liquids in connection with the garage business when more than 1,065 gallons are stored.

Section 249 of The Chicago Municipal Code of 1922, pertaining to public garages, provides that every person, firm or corporation licensed to conduct a public garage shall have the privilege of carrying on the business of a filling station, provided the combined capacity of all tanks used for the storage of gasoline and similar liquids does not exceed 1,065 gallons, without the necessity of obtaining additional licenses. The implication, therefore, is that whenever more than 1,065 gallons are stored in connection with the operation of a public garage, additional licenses must be secured.

Section 2279 of The Chicago Municipal Code of 1922 provides that any person, firm or corporation desiring to install a tank for the storage of gasoline and similar inflammable liquids shall first obtain a permit so to do from the Chief of Fire Prevention and Public Safety, and further provides that frontage consents shall be obtained. Paragraph (b) of said section provides as follows:

“These provisions shall not be applicable to the installation of a tank or tanks containing any of the oils referred to in section 2277 when such oils are to be used in connection with garages or manufacturing plants where such oils are incidental to the business conducted or oils used for fuel purposes.”

Inasmuch as the ordinance relative to public garages provides that additional licenses do not have to be acquired if the storage of inflammable liquids to be used in connection with the garage business does not exceed 1,065 gallons, the implication is that when the amount of 1,065 gallons is exceeded, the storage of such liquids is no longer considered incidental to the business conducted, and additional licenses must be secured.

In conclusion, therefore, we advise you that whenever a public garage desires to store more than 1,065 gallons of gasoline it should be required to procure frontage consents for a filling station.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Gasoline Filling Station Within Two Hundred Feet of Theater.

April 22, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of April 21st relative to proposed gasoline filling station at 3401-3405 West 63d street, and requesting the views of this department.

The proposed gasoline filling station, as we understand it, conforms to the provisions of the Zoning Ordinance and proper frontage consents have been obtained.

You state that you have refused a permit because the proposed filling station is within 200 feet of a theater. You further state that it has been the policy of your office to issue permits in cases of this kind where a council order has been obtained, and you propound to us the following question :

“Would I be entirely within my rights in issuing permits of this character where council orders are passed ordering me to issue the permit, provided the necessary frontage was obtained?”

Paragraph 2279 of The Chicago Municipal Code of 1922 referring to gas filling tanks reads in part as follows :

“No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.”

In accordance with decisions of our Supreme Court and the consistent rulings of this department heretofore, we are constrained to advise you, as a matter of law, that in determining whether or not to issue a permit for proposed gasoline stations, you must be guided solely by the ordinances of the city.

Our Supreme Court has repeatedly held that an ordinance of the city cannot be amended, modified, suspended, or repealed by an order, and that, where the terms and provisions of an ordinance and an order are in conflict, the order must give way to the ordinance. (173 Ill. 91; 174 Ill. 439; 203 Ill. 23; 214 Ill. 102; 207 Ill. App. 570.)

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Penny-in-Slot Fortune Telling Machine.

April 23, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested an opinion as to whether a penny fortune telling machine called "Sphinx" is a violation of the law or ordinances. We have examined the machine in question and find that it operates by placing a penny in a slot after a pointer has been placed at the question on the dial which it is desired answered. Some of the questions which the machine answers are as follows:

"Future wife? Will I get married? Shall I have a family? Will I travel? Will I be wealthy? Future husband?"

The answer to the question then appears at a window placed in the machine. It is stated on the machine that it answers these questions intelligently.

You have informed us that the owner of the machine was prosecuted under Section 2630 of The Chicago Municipal Code, and that he was discharged in view of the case of *City of Chicago v. Ross*, 257 Ill. 676. This case merely held that the City of Chicago had not been granted the power to legislate relative to fortune telling and similar pursuits. However, there is no question but that the Legislature has such power, and there is a statute which provides as follows:

"273. FORTUNE-TELLING — PENALTY — EXCEPTIONS.)
Section 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That whoever shall obtain money or property from another by holding himself out as skilled in fortune telling by means of card reading, palmistry, clairvoyancy, astrology, seership, spirit mediumship or any crafty science, or by any other devices or practices whereby money is

obtained from the general public on the pretense of the exercise of occult or psychic powers, shall for each offense be fined not exceeding five hundred (\$500) dollars. Provided, that the provisions of this Act shall not be construed to include, prohibit or interfere with the exercise of the spiritual functions or offices of any priest, minister or accredited representative of any religion, and provided further the provisions of this Act shall not be construed to include or refer to the practice of the belief known as Spiritualism or to any attempted communication with the spirit world, by or through so-called mediums."

We, therefore, advise you that the owners of all such machines as the one in question should be booked under Section 273 of the Criminal Code.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Revocation of Permit for Filling Station.

April 27, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested an opinion from this office as to whether you are justified in revoking a permit for a filling station to be located at 1132 South Kedzie avenue. The facts, as stated in your communication, and as set forth in the affi-

davits of the interested parties, are that on April 20, 1925, the Superintendent of Maps reported that the applicant for said permit had obtained a majority of frontage consents of 4.09 feet, and accordingly the permit was issued by your department. You were then notified according to affidavits filed in your office that credit should not have been given to the Reel Amusement Company for Lots 30, 31 and 32, because it was stated that on April 7, 1925, one Joseph Siegel had purchased the said lots from the Reel Amusement Company and had recorded the deed on April 9. An investigation then showed that the Recorder's Office was about two weeks behind in posting title into the tract index book, and that the mistake came about in this way. We have been given to understand that no work has as yet been commenced upon the said filling station. An affidavit has also been filed of one of the other property owners interested, Etta Karn, in which the affiant states that her signature to the erection of the filling station was secured through a misrepresentation.

Upon this state of facts, we advise that this office is of the opinion that the said permit should be revoked. It is obvious that the applicant did not have the required frontage consents at the time the permit was issued, and the owner of the property purchased from the Reel Amusement Company cannot be deprived of his right to grant or refuse his consent to this filling station merely because of the fact that the recorder was slow in making entries on his books.

All papers are herewith returned.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Charge for Sending Fire Apparatus to Outlying Municipalities.

April 28, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have called our attention to the fact that under Sections 1187, 1188 and 1189 of The Chicago Municipal Code of 1922, authority is granted the Chief Fire Marshal, subject to the approval of the Fire Commissioner, to send fire apparatus outside the limits of the City of Chicago when requested so to do by the authorities of any city, town or village within the radius of 100 miles from the City of Chicago.

By Section 1190 the Mayor is given the power to remit the charges for such services. The said sections above referred to are as follows:

“1187. AUTHORITY TO SEND FIRE APPARATUS OUT OF CITY.) The chief fire marshal, subject to the approval of the fire commissioner, shall have authority to send fire apparatus and firemen outside of the corporate limits of the city of Chicago, whenever requested so to do by the authorities of any city, town or village lying contiguous to, or within a radius of one hundred miles from the city of Chicago, provided that such apparatus can, in the judgment of the chief fire marshal, be spared from service in the city of Chicago at the time requested.

“1188. RATES FOR SERVICES.) The rates for service rendered by the fire department outside of the corporate limits of the city of Chicago, as provided for in the preceding section, shall be as follows:

For each engine company, truck company or squad company, twenty dollars for the first hour or fraction thereof and fifteen dollars per hour for all time after the first hour. The time for which charge is to be made shall be computed from the time the fire apparatus leaves its quarters to the time of the official return to service of said fire apparatus.

“1189. WARRANTS FOR COLLECTION—DEPARTMENT OF FINANCE TO COLLECT.) The fire commissioner shall, within five days after the rendering of any such service by the fire department outside of the corporate limits, draw a warrant for collection, on the city, town or village to which service was rendered, for the amount due the city of Chicago, and transmit same to the department of finance for collection in the manner provided by law.

“1190. POWER OF MAYOR TO REMIT CHARGE.) Whenever it shall be made to appear, to the satisfaction of the mayor, that there is justifiable ground for remitting the charge for service rendered outside of the corporate limits of the city by the fire department he shall have authority so to do.”

You state that your department is frequently called on by telephone to extinguish fires outside of the City, and that you do not have time to see that the calls come from the authorities of the various villages. You also state that it has been the custom to issue no warrants for collection, and you wish to know whether you should continue to follow this custom.

With regard to the fact that you frequently do not have time to ascertain whether the calls for assistance come from the authorities of the various villages outside of the City of Chicago, it is our suggestion that you pass a rule or regulation to the effect that only calls from the authorities shall be recognized, or some similar regulation which, in your opinion, will cover the situation.

With regard to the custom of not issuing warrants for collection, the ordinance imposes upon the Fire Commissioner the duty of drawing up a warrant for collection whenever such services are rendered, and to transmit the same to the Department of Finance for collection.

The ordinance further provides that the Mayor may remit the same whenever it appears to his satisfaction that there is justifiable ground for so doing. We therefore suggest that you take this matter up with the Mayor, since this is entirely a matter of policy which the Mayor must decide. If the Mayor sees fit to lay down a general rule for remitting such

charges, you should, of course, follow such rule. If, on the other hand, the Mayor does not lay down any such general rule, it is then your duty, under the ordinance, to prepare such warrants for collection in every case, and to notify the Mayor of the facts. If the Mayor does not act by remitting such charges, you should then forward the warrant to the Department of Finance as required by the ordinance.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Rights of Former Pensioner Under Policemen's Annuity and Benefit Fund Act.

Chicago, April 28, 1925.

THE RETIREMENT BOARD, Policemen's Annuity & Benefit
Fund.

Gentlemen:

In reply to your inquiry of April 23, 1925, as to pension rights of Johanna Cooney, the following is submitted:

Your letter states that Johanna Cooney is the widow of Patrick J. Cooney, a patrolman, who resigned on February 12, 1914, with a service credit of 25 years, 10 months and 12 days; that his salary at the time of his resignation was \$1,320 per year; that he was granted a pension on April 24, 1914, at the rate of \$660 per year; that Mr. Cooney died February 17, 1923; that on March 14, 1923, Johanna Cooney was granted a pension of \$50 per month.

At the time Patrick J. Cooney resigned, the Police Pension Act of 1887, as amended June 13, 1913, provided in Section 3 thereof, that a policeman who had served for a period of twenty years or more in the police department and whose services in such police department had ceased, should be paid a yearly pension equal to one-half the amount of the salary attached to the rank which he may have held in said police department for one year immediately prior to the time of his retirement; and after the death of such policeman pensioned by virtue of that section of the act, the widow of such pensioner should receive the same pension as had been received by such deceased husband, but not to exceed \$900 per annum.

Under the aforementioned amendment of 1913, Johanna Cooney became entitled, upon the death of her husband, to be paid a pension in the same amount as was being paid to Patrick J. Cooney, provided the legislature did not at some subsequent date change such right.

In 1915, a new Police Pension Act was passed by the legislature, which act superseded the Act of 1887. The provision relative to the pension to be paid to the widow of a policeman under the circumstances such as exist in this case is substantially the same as the provision in the Act of 1887, as amended in 1913, excepting that the Act of 1915 required that, to entitle a widow to a pension, the marriage of a policeman pensioned under the Act of 1915 should have taken place more than six months prior to the time such pension was granted him.

In 1917 the Police Pension Act of 1915 was amended to provide that the widow should be paid a pension in case the marriage of such policeman had taken place more than one year prior to the time a pension was granted him under said amendment. The amendatory act of 1917 further provided in Section 5 thereof that from and after the going into effect of the amendatory act the pension to be paid any widow should not be less than \$600 per annum.

In 1921 the present Policemen's Annuity & Benefit Fund Act was passed, which act provided, in Section 50 thereof, that

the widow of any policeman who was a pensioner under the Police Pension Act of 1915, should have a right to receive a pension in accordance with the provisions of the act of 1915, as subsequently amended.

As the act of 1915 superseded the act of 1887 and included as beneficiaries and pensioners under the act of 1915 all those who were pensioners by virtue of the act of 1887, Patrick J. Cooney came within the description of a pensioner "under and by virtue of the act of 1915, as amended."

There does not appear to be anything in any of the police pension acts of the Legislature subsequent to the year 1913 which would deprive Johanna Cooney, the widow of Patrick J. Cooney, of any right given to her by the act of 1913.

I am of the opinion, under the statement of facts given to me in this matter, that, upon the death of Patrick J. Cooney, his widow, Johanna Cooney, became entitled to be paid a pension of \$55 per month.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Identity of Designs of Taxicab Companies' Vehicles.

April 29, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your inquiry of April 10th, to which was attached a letter to you from Lieut. James J. Killackey, com-

manding the Vehicle Bureau, asking for an opinion as to whether or not the newly formed Diamond Cab Company can operate its cabs bearing identical designs as the old cabs formerly owned by the defunct Diamond Cab Company which was taken over by the Premier Cab Company, which is still operating the old diamond-marked cabs.

Our ordinances contain no reference as to what design shall appear on the cabs, but under the powers and duties conferred upon the Public Vehicle License Commission (now known as Section 3916 of The Chicago Municipal Code of 1922) “* * * to make all necessary rules and regulations * * * for the protection of patrons of all such public vehicles,” said commission passed Rule No. 5, reading as follows:

“No public vehicle or the owner of a public vehicle shall be licensed under the provisions of the Ordinance, if, in the judgment of the Commission, the automobile, autocar or other similar vehicle sought to be licensed as a public vehicle, is constructed, designed, painted or labeled as to be so similar to the automobiles, autocars or other similar vehicles of any other person, firm or corporation engaged in the business of operating public vehicles in the City of Chicago, as to be an imitation thereof and calculated to deceive the patrons of public vehicles into believing that such automobiles, autocars, or other similar vehicles are in reality the automobiles, autocars or public vehicles of said other person, firm or corporation.”

This rule bears directly upon the proposition under discussion and has been declared to be valid and lawful in an opinion heretofore rendered by this office.

Under this rule the commission may, in its judgment, declare, upon proper showing, whether a particular company is entitled to a special design befitting its name, and also to determine whether a design is in use which calculates to create confusion and misunderstanding.

From information and statements received by this office we find that the old Diamond cabs are not being identified as required by ordinance, and carry upon their doors names of

different companies such as "Diamond," "Acme" and "Premier," yet all bearing diamond designs.

It is our opinion that where a company, as in this instance, is not in good standing and has failed to comply with our laws and ordinances, such company should not, so far as lies in our power, be guaranteed the right to a popular design which from all intents and purposes is being maintained and continued for no other purpose than to prevent the accredited Diamond Cab Company from using a diamond-shaped design as its insignia.

Accordingly, you may advise the newly formed Chicago Diamond Cab Company that you will receive its applications for licenses.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Demand for Return of License Fee.

May 2, 1925.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

You have asked an opinion relative to the request of Mr. Charles Weeghman, 2746 Hampton court, for a refund of the license fee which he paid the City of Chicago in order to obtain a public place of amusement license for the Club Royale, 320 North Michigan avenue. You state that the license fee of \$250 was paid on December 31, 1924. Mr. Weeghman was given a receipt for the fee, which receipt distinctly stated that it was not to be construed as the issuance of a license. Sub-

sequently the Commissioner of Health and Commissioner of Buildings disapproved the application, and Mr. Weeghman was so notified on February 25, 1925. The license has never been issued. Mr. Weeghman conducted the place for which the license was sought for a period of about two and one-half months—from January 1 to March 15, 1925.

The following ordinance was passed by the City Council on July 2, 1923, relative to the refunding of license fees (C. P. of said date, 769):

“Section 2414A. LICENSE FEES TO BE PAID IN ADVANCE—PAYMENT OF FEE NOT TO BE CONSTRUED AS THE ISSUANCE OF A LICENSE.) All applications for a license, made to the City Collector, shall, after approval by the Commissioner of Buildings as to compliance with the zoning ordinance, be accompanied by the full amount of the fee payable for such license.

“Whenever a license cannot be issued at the time the application for the same is made, the City Collector shall issue a receipt to the applicant for the money paid in advance. All such receipts shall have plainly indicated thereon that the receipt or payment of the license fee is not to be construed as the issuance of a license.

“No such receipt, or the payment of any license fee in advance of the issuance of the license in due form, shall entitle or authorize any person, firm or corporation to any of the rights or privileges conferred by the issuance of any license, or to the opening or maintaining of any business or establishment contrary to the provisions of any of the ordinances of the City of Chicago.’

“Section 2414B. NON-APPROVAL OF LICENSE—ISSUANCE—REFUNDS.) Whenever a license is not approved and the applicant has not engaged in the business or industry for which the license was sought, the license fee paid in advance shall be refunded to the applicant upon the recommendation of the City Collector and the approval of the City Comptroller.

“Whenever the applicant engages and continues in any business or industry throughout the greater part of the period for which a license has been applied for, and whenever such license has not been approved by the department or departments having jurisdiction and no proceeding or action is pending to close or discontinue such business or industry, the City Collector shall recommend

the issuance of the license on the last day of the respective license period, and the Mayor may issue such license as a 'Provisional License' pending the approval or action of the departments having jurisdiction. In such instances the provisions of this section shall be construed to be effective in lieu of other ordinances in conflict therewith."

Assuming that your statement is correct, that Mr. Weeghman conducted his place of amusement for a period of two and one-half months while his application was pending and that he conducted his place of amusement for a period of twenty-five days after he had been notified that his application had been disapproved, it is clear that he is not entitled to a refund of the license fee. According to the provisions of the above quoted ordinance, Mr. Weeghman is not entitled to a refund of this fee because he was operating a place of amusement without a license, pending action upon the application, and, further, he was not operating under a "Provisional License."

In conclusion we recommend that the request of Mr. Weeghman for a return of this license fee be denied.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Contributions to Fund for Firemen's Benefit.

May 6, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We are in receipt of a communication from you in which you state that you contemplate a plan by which a day will be

set apart as a Firemen's Benefit, when persons who desire to contribute directly to the benefit of the firemen may do so, and you state that you believe that a fund of \$200,000 could be so raised, one-half of which would be placed in the Pension Fund, and the other half divided among the firemen. We do not see any legal objection to this plan. Although the Firemen's Pension Law provides that all moneys or gifts received by any member of the Fire Department for services, ordinary or extraordinary rendered by him, in his capacity as a fireman, must be paid into the Firemen's Pension Fund, Section 1204 of the Fire Department ordinance to the contrary notwithstanding, this provision in the Civil Service Law does not militate against the proposed plan because money received at such a benefit is not to be paid to firemen for services rendered in their capacity as such.

You have also called our attention to the fact that the magazine known as "Fire" published by the Firemen's Mutual Aid & Benefit Association has requested you to endorse their magazine to the extent of instructing members of the department that the commanding officers of the department are desirous of contributing so far as possible to the success of the magazine, and to do all they can to further the interests of the magazine.

Although it might be outside of the strict conduct of the affairs of the Fire Department for your department officially to edit such a magazine, there surely is no legal obstacle to your endorsing a magazine which is operated and published voluntarily by members of your department. The desirability of your so endorsing the magazine is, of course, a question of policy upon which this department has not sufficient information to presume to advise you.

Very respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Proposed Amendment Concerning Frontage Consents for Undertaking Establishments.

May 9, 1925.

HON. JACOB M. ARVEY, Chairman, Committee on Judiciary.

Dear Sir:

This will acknowledge receipt of your letter of the 8th instant concerning proposed amendment to Section 1902 of The Chicago Municipal Code of 1922.

Section 1902, at present, makes it unlawful to conduct an undertaking establishment in any block in which *two-thirds of the buildings* on both sides of the street are used *exclusively for residence purposes* without consents of a majority of the frontage on both sides of the street.

The proposed amendment would make it unlawful to conduct an undertaking establishment in any block in which *one-third of the buildings* on both sides of the street in such block are used exclusively *for residence purposes* without consents of a majority of the frontage on both sides of the street, provided that such consents shall not be necessary in any block in any street in which street cars are operated.

The City has been expressly granted the authority to legislate upon the subject of undertaking establishments by virtue of Clause 77, Section 1, Article V of the Cities and Villages Act, which reads as follows:

“The City Council * * * shall have the following powers: * * * Seventy-seventh. To erect and establish hospitals and medical dispensaries and to regulate hospitals, medical dispensaries, sanatoria and undertaking establishments, and to direct the location thereof.”

In the case of *Cusack Company v. City of Chicago*, 267 Ill. 353, the Supreme Court, in sustaining a frontage consent ordinance in regard to billboards, said:

“In respect to occupations or structures the location and maintenance of which are subject to regulation under the police power of the municipality, a requirement of frontage consents of property owners within reasonable limits is a proper mode of exercising the power of regulation vested in the municipality. Ordinances of this general character have been upheld in regard to livery stables in *City of Chicago v. Stratton*, 162 Ill. 494, in regard to dramshops in *Swift v. People*, 162 Ill. 534, and in respect to garages in *People v. Ericsson*, 263 Ill. 368.”

Under the above decisions, in our opinion the City has the power to pass the amending ordinance which is herewith enclosed.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City for Extras on Sub-Structure of Adams Street Bridge.

May 13, 1925.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

In response to your communication of February 4, 1925, concerning claim of FitzSimons and Connell Dredge & Dock Co. for extras in connection with the sub-structure contract for Adams street bridge, containing an inquiry as to the liability of the City as to such extras, we desire to say we have examined the file submitted. We have ascertained from an examination of the letters in the file forwarded that the

Commissioner of Public Works on several different occasions authorized the contractor to perform service and furnish supplies for work which was not stipulated to be performed in the original contract and that the Commissioner of Public Works informed the contractor that such extra work and supplies would be paid for by the City and that the amount so promised to be paid for extra work and supplies amounts to \$19,270.92. It appears that all of such work performed and supplies furnished were performed and supplied to take care of an emergency situation.

From a reading of the contract entered into we find that it is provided that the Commissioner of Public Works, acting in his representative capacity for the City, has reserved to him the right to make necessary and proper alterations in the plans and specifications for the work included in the contract, but that where such alterations increase the expense of such work the commissioner shall report such alterations to the City Council with his estimate of the amount of the increase in expense to the City. The contract also provides that no payment shall be made to the contractor for any extra work or material unless such payment shall be authorized by the City Council.

The question presented by the facts shown in the files is whether or not the Commissioner of Public Works in authorizing these payments without first obtaining the consent of the City Council was performing such acts as would be *ultra vires* or without authority to bind the City.

There have been a number of litigated cases on this subject which have been decided by the Supreme Court in this State.

There can be no question but that the contract entered into in this case was one which could be legally and properly entered into by the City, and there can be no doubt but that the extra work performed was necessary to the full execution of the contract, and that such work was ordered to be done and the supplies furnished by the contractor to the City by the Commissioner of Public Works, in good faith and un-

der such circumstances that it would have been impossible or impracticable, in the emergency existing, for him to have reported the alterations necessary and expense to be incurred to the City Council before making such alterations in the contract.

The question involved in this particular transaction is one which in our opinion was decided in the *McGovern* case, which is reported in the 281 Ill., on page 264. The court in that case, on page 280, said:

“The sole question, so far as the right to recover on the contract is concerned, is whether, after making the contract and after the contractor has fully performed according to its terms and conditions and as directed by the city officials, and after the city has thereby received the benefit of the work, labor and materials, the city is now in the position to set up the informalities and irregularities urged, under the circumstances of this case.

“There is a distinction between contracts which are *ultra vires* and contracts which are within the power of the city to make but which have been irregularly or illegally made but have been performed in good faith. In *Dillon on Municipal Corporations* (5th ed. sec. 1611) it is said: ‘A municipal corporation, as against persons who have acted in good faith and parted with value for its benefit, cannot, unless by virtue of some statutory provision, set up mere irregularities in the exercise of power conferred, as, for example, its failure to make publication in all of the required newspapers of a resolution involving the expenditure of moneys. Such failure might have the effect to invalidate a local assessment upon the abutter if there were no grounds of estoppel, this being a matter *in invitum*, but as regards a *bona fide* contractor with the city who had expended money for its benefit in respect of a matter within the scope of its general powers, the contract would not be *ultra vires* in the true sense of that term, and the city would be estopped to set up as a defense its own irregularities in the exercise of a power clearly granted to it. * * *’

On pages 281, 282, 283 and 284 it was also said:

“The contract sued on was of such a nature that the city could lawfully have entered into it. The city

was charged with the duty of keeping its streets in repair for public use and was authorized by law to make the necessary expenditures and contracts for such purposes. It could and did appropriate, by ordinance, money from its general fund, and in addition thereto had been authorized by the legislature to impose license fees on vehicles using the streets and use the fees collected for such repairs, and by ordinance the city appropriated such fees for the purpose provided by law,—that is, the repairs for which the contract was entered into. The reason and purpose for such legislation are apparent, and the probable amount to be realized and expended from such fees appears in the record.”

“In *County of Coles v. Goehring*, 209 Ill. 142, it is said on page 165 of the opinion: ‘Where a statute, in authorizing a municipal corporation to exercise a certain power, specifically regulates the mode in which that power is to be exercised, but the municipal authorities exercise it in a manner different from that prescribed by the statute, the municipality will be estopped from setting up the irregular exercise of the power when it is called upon to pay for what it has received, where the proof shows that it has received and accepted the benefit of the contract thus irregularly entered into.’ A large number of authorities are cited in the opinion in that case, among others, *County of Jackson v. Hall*, 53 Ill. 440, in which it was held that the county of Jackson was estopped from denying liability, although there was no contract made, for the building of a jail, inasmuch as the jail was accepted by the county authorities and used by them when completed; also *Hitchcock v. Galveston*, 96 U. S. 341, where the city agreed to pay for sidewalks in bonds and the bonds were held to be invalid, and it was decided that the city was liable upon its contract, and that, although it had agreed to pay in a way in which it had no power to pay, having received the property it was estopped to deny its contract.

“In *City of Chicago v. Pittsburg, Cincinnati, Chicago and St. Louis Railway Co.*, 244 Ill. 220, we held that if a city may lawfully exercise a power, it may be equitably estopped, as right and justice may require, to question the validity of the exercise of such power on account of the manner in which it was done or because of the lack of required formalities,—citing *Chicago and Northwest-*

ern Railway Co. v. People, 91 Ill. 251; *City of Chicago v. Carpenter*, 201 *id.* 402; *People v. Blocki*, 203 *id.* 363; *Village of Winnetka v. Chicago and Milwaukee Electric Railway Co.*, 204 *id.* 297; *Village of London Mills v. White, supra.*”

“* * * This class of municipal contracts is well illustrated by the case of *City of East St. Louis v. East St. Louis Gas Light and Coke Co.*, 98 Ill. 415. In that case the city of East St. Louis contracted for the lighting of its streets with the gas company, at a fixed price per light, for the term of thirty years. A suit was brought by the gas company to recover the monthly installments that were past due under the contract. The city defended on the ground that the contract was *ultra vires* and that no suit could be maintained thereon. This court held that the lighting of the streets was a purpose clearly within the corporate powers of the city; that the contract had no element of illegality in it and that it was only illegal in respect to the term of its duration; that the corporation having received the benefits under a contract which was merely *ultra vires* it was bound to pay for the benefits received, and that the rule applicable to municipal corporations in this regard was the same as in the case of a private corporation. Many cases are to be found applying this rule, and the principle is now firmly established that the doctrine of *ultra vires* is not applied (except in cases where the contract is prohibited by some rule of law) where its enforcement would enable the municipality to obtain an unconscionable advantage of the other party to the contract, and that municipal corporations, as well as private corporations and natural persons, are bound by the principles of common honesty and fair dealing. Contracts made by a municipality which are merely *ultra vires* in a modified or secondary sense may be ratified and any defect in the manner of exercising the power thereby cured, and the municipality may likewise estop itself by acts *in pais* from setting up the defense of *ultra vires*.—2 Dillon on Mun Corp.—5th ed.—Sec. 797.”

It is therefore our opinion that as to the particular case submitted by your communication, it comes within the rule laid down in the case above cited, and that the City is liable for the amount \$19,270.92 as authorized by the Commissioner

of Public Works, regardless of whatever right the City might have against the Union Station Company.

Yours very truly,

FRANK J. CORR,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Sum to be Applied in Payment of Fine by Labor in
House of Correction.**

May 14, 1925.

HON. JACOB M. ARVEY, Chairman, Committee on Judiciary.

Dear Sir:

You have requested this office to pass on the legality of the proposed amendment to Section 2263 of The Chicago Municipal Code of 1922, which proposed amendment is as follows:

“WHAT PRISONERS TO BE RECEIVED—PRISONERS TO LABOR—CREDIT FOR LABOR PERFORMED.) It shall be the duty of said superintendent to receive into the said house of correction such persons as may be committed thereto by any court or magistrate in Cook county authorized by the laws of the state or by any ordinance of the city, or any town or village in Cook county having a contract with the city for the care of its prisoners to commit prisoners to such house of correction, and to put each of such persons so committed as are able to labor to the work which they are respectively best able to do, not to exceed ten hours for each working day. Every person committed to the house of correction by a judgment of the municipal court for a violation of any city ordinance shall be allowed, for each day's work, exclusive of his or her board, the sum of *one dollar* which shall be applied in payment

and satisfaction of the fine and costs imposed upon such person.”

The above amendment changes the sum to be applied in payment of a fine by labor in the House of Correction from 50 cents to \$1. In our opinion, the City has no power to change this amount, because the same is fixed by the statute. Section 1 of “An Act to provide for the punishment of persons violating any of the ordinances of the several cities and villages of this State,” approved and in force April 12, 1879, provides, in part, as follows:

“Any person upon whom any fine or penalty shall be imposed may, upon the order of the court or magistrate before whom the conviction is had, be committed to the county jail or the calaboose, city prison, workhouse, house of correction, or other place provided by such cities or villages by ordinance, for the incarceration of such offenders until such fine, penalty, and cost shall be fully paid: *Provided*, that no such imprisonment, shall exceed six months for any one offense. The city council or board of trustees of any such cities or villages shall have power to provide by ordinance that every person so committed shall be required to work at such labor as his or her strength will permit, within and without such prison, workhouse, house of correction or other place, provided for the incarceration of such offenders, not to exceed ten hours each working day; and for such work the person so employed, or worked, shall be allowed, exclusive of his or her board, the sum of fifty cents for each day’s work on account of such fine and costs.”

In conclusion, we advise you, that the proposed amendment is illegal and invalid, and that the City has no power to change the sum of 50 cents to \$1, because the same is fixed by statute.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Legal Status of Illinois Birth Control League.

May 14, 1925.

MR. HENRY STEWART, Secretary, Subscription Investigating Committee, Chicago Association of Commerce.

Dear Sir :

You state that your committee has had considerable correspondence with Dr. Herman N. Bundesen, Commissioner of Health, relative to the Illinois Birth Control League; that you desire to know whether the same has been licensed by the Health Department, and what is its legal status. Dr. Bundesen has referred you to this office.

On October 11, 1923, a petition for mandamus was filed by Helen G. Carpenter as president of the "Parents Clinic" for the purpose of requiring the Health Commissioner to grant the said "Parents Clinic" a clinic license. The avowed purpose of the "Parents Clinic" was to disseminate knowledge relative to the use of contraceptive devices. The trial court held that the Health Commissioner should have granted a license to this clinic, but the Appellate Court reversed the trial court and held that it was not an abuse of the discretion of the Health Commissioner to refuse to grant this license. The "Parents Clinic," therefore, is not operating by virtue of any license ever granted by the City of Chicago.

It has always been the contention of the City that an institution for the purpose of dissemination of contraceptive information is not a clinic, dispensary or hospital, within the definition of those terms as given by the Chicago Municipal Code. That being the case, we do not believe that the City could successfully prosecute any such institution for operating without a clinic license. At the present time, there is no statute in force in the State of Illinois which prohibits the dissemination of this literature, and the only ordinance of the City of Chicago which is in any way pertinent to this question is Section 2671 of The Chicago Municipal Code of 1922,

which prohibits the selling, giving away or distributing of any books, pamphlets, circulars, etc., treating of articles or means of preventing conception. Section 2673 of the code makes it unlawful to advertise in any newspaper or other publication, or in any other way, sources from which information relative to the prevention of conception can be obtained. There are also similar federal statutes relative to using the mails for such purposes.

So long as the Illinois Birth Control League, or institutions organized for the purpose of disseminating contraceptive knowledge, do not distribute printed matter or advertise where such information can be obtained or send the same through the mails, they are not violating the law.

It is our belief, and this department has formerly rendered such an opinion to the Health Commissioner, that an ordinance could be drafted making such institutions unlawful, and a nuisance, and that such an ordinance could be sustained in the courts. Of course, the legislature could pass a statute prohibiting such institutions also.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Reinstatement of Resigned Lieutenant in Fire Department.

May 15, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have requested this office to render you an opinion relative to the request of George W. Halstrom for reinstatement in the Fire Department. Mr. Halstrom was appointed

probationer in the Fire Department on October 1, 1908. He became a regular member April 1, 1909. On October 24, 1918, he was promoted to lieutenant. On February 18, 1921, he resigned. On February 21, 1923, he was reinstated. On February 22, 1923, he resigned. While in the service of the City, he waived certification nine times. While on leave of absence he took a promotional examination for the position of captain and passed, so that if he is now reinstated, he will be about six on the present eligible list of captains. The Civil Service Rules provide that "waivers whether continuous or otherwise, should not be permitted for a period longer than one year, provided, however, that where an eligible enters the military or naval service of the United States or is holding an existing position in the classified service, and for that reason waives certification, such waiver may stand during the life of such register unless sooner withdrawn." If the waiver of the said George W. Halstrom covered a period of more than one year, unless he was in the military or naval service of the United States, etc., there would be a violation of the rules of the Civil Service Commission, which would be grounds for dismissal, and the Civil Service Commission would therefore be justified in refusing to reinstate him.

However, we are of the opinion, that Mr. Halstrom is not entitled to be reinstated. The Civil Service Rules relative to resignation and reinstatement provide as follows:

"Sec. 2. *Resignation.* A copy of the resignation of an officer or employe from the classified service shall be filed with the Commission by the head of the department receiving and accepting the same. The Commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing of the same, provided, the head of the department concerned approves of such withdrawal and cancellation.

Sec. 3. *Reinstatement.* When any officer or employe has returned from a leave of absence and his position in the meantime has been filled by certification, or when any officer or employe has been laid off in accordance with the preceding section, or when the position of any officer or employe has been abolished, such officer or employe

shall have precedence to reinstatement in a position of the same branch, class, grade or rank and character of work and approximate pay, according to his seniority of certification."

According to Section 2 of the above quoted rules, a resignation may be withdrawn upon application at any time within thirty days after the filing of the same, provided the head of the department approves.

Although we are informed that in the past civil service employes have been reinstated after a period of thirty days has expired from the time of their resignation, we do not find any authority in the rules of the Civil Service Commission for such procedure. The rule limits the time during which a resignation may be withdrawn to thirty days. After the thirty day period, neither the commission nor the head of the department has any right to reinstate the former employe. Since Mr. Halstrom resigned from the department more than two years ago, it is our opinion that he has no right to be reinstated.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of Property Owner to Fence in Parkway.

May 16, 1925.

HON. ALBERT HORAN, Alderman, 29th Ward.

Dear Sir:

You have requested an opinion from this office relative to the right of the City to stop property owners from fencing in the parkways between the sidewalk and the curb.

The parkways and sidewalks are both parts of the street, and as such must be devoted to general street purposes. In

other words, the sidewalks and parkways should be devoted to the use of the public for travel, transportation and ordinary street purposes, and any obstructions which would impede or hinder the use of the streets, sidewalks or parkways, are illegal.

Section 3556 of The Chicago Municipal Code of 1922 provides for the width of sidewalk space and construes sidewalk space as "the space between the building line and the curb line." Section 3558 of said code, provides that:

"No part of any sidewalk or sidewalk space shall be taken for private use by lowering or cutting down the same next to the building, *or railing off the space by any wooden or iron railing, or by shutting off the public from passing along and over the same*, and the said sidewalk shall not be raised up next to the building by constructing a platform or platforms on the same, of either wood, iron or stone, but said sidewalk shall be built flush up to the building on a uniform grade as herein provided."

According to the above quoted provisions of the City ordinances, the sidewalk space is defined as the space between the building line and the curb line, which, of course, includes parkways, and further provides that no part of the space may be railed off. Therefore, it is unlawful to rail off or fence in such parkways.

Section 3564 of The Chicago Municipal Code of 1922 provides that "it shall be the duty of the department of public works, the bureau of sidewalks, the department of police and of any city officer and any employe having police power, to enforce the provisions of this ordinance by stopping any work being done in violation of the terms of this ordinance."

We therefore advise you that whenever parkways are fenced in, you should report the same to the above mentioned departments and officials.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Revenue from South Water Street Premises About to be Vacated.

May 16, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You have informed this office that certain payments are being made to the City as rent for premises still occupied by tenants on South Water street who will eventually have to vacate in view of the improvement proceedings, and you desire to know whether the revenue so derived should be paid into the special assessment warrant or bond fund or to the corporate fund as rent of City property.

The authority of the City to issue special assessment bonds is derived from the Local Improvement Act, which gives the City the power and authority to issue special assessment bonds for the purpose of anticipating the collection of special assessments. The rent from property on South Water street is not, strictly speaking, a part of this fund. In theory, the amount raised by the sale of the special assessments, and thereafter amounts paid the City as rent, have no place in this fund. The rent payments are made in view of the fact that the title to the property is now in the City, but the tenants have not yet been forced to vacate. Therefore, the City is simply holding this real property until such time as it shall be vacated for the purpose of carrying out the improvements. Moneys derived from such sources should properly be credited to the general corporate fund as leases and rents of City property.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Claim of Automobile Dealer for Excise Tax.

May 16, 1925.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

You have requested an opinion from this office relative to the liability of the City on the claim of the Thomas T. Hoskins Company for the amount of \$529.50. It appears that on June 18, 1924, a council order was passed (C. P., p. 3354), reading, in part, as follows:

“Ordered, that the Superintendent of Police be and he is hereby authorized, in accordance with his request, to purchase * * * six new standard police department patrol bodies at a price of not to exceed \$1765.00 each as per proposal of the Thomas T. Hoskins Company, dated June 17, 1924 * * *.”

The proposal referred to in the said council order, and dated June 17, 1924, quotes the Police Department on six new standard police patrol bodies “for the net sum of \$1765.00 each.” After having purchased said bodies at the net price of \$1,765, the Thomas T. Hoskins Company has submitted a claim for \$529.60, as 5 per cent excise tax on the six new patrol bodies.

The proposal of the Thomas T. Hoskins Company was that they would furnish the bodies to the Police Department for “the net sum” of \$1,765 each. The matter of excise tax was not definitely stipulated in either the quotation of the Hoskins Company or in the council order. It is our opinion that when the proposal was made by the Thomas T. Hoskins Company to sell the said bodies to the police “for the net sum” of \$1,765 each, the implication was that the excise tax would be paid by the said Thomas T. Hoskins Company. If this were not the case, then \$1,765 would not be “the net sum.” Furthermore, according to the council order, the Su-

perintendent of Police had no authority to contract to purchase bodies for a greater price than \$1,765.

In conclusion, we respectfully advise you that, in our opinion, the claim of the Thomas T. Hoskins Company for \$529.50 should be denied.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Removal of Buildings Upon Installation of Gas Filling Stations.

May 16, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have called our attention to the fact that when applications for permits for the installation of filling stations are made, the site or location is frequently improved with buildings which must be removed before the station can be erected. You desire to know whether you would have the right to require applicants to furnish the Fire Prevention Bureau with a letter stating that the existing buildings will be removed within ninety days (after which period the permit expires unless work is begun) before the work on the filling station is commenced. There is no question but that you have the right to make such reasonable regulations relative to facilitating the work of your office as are necessary properly to comply with the ordinances. We are of the opinion that you could require applicants to furnish you with such a letter, and we

further suggest that you write upon the permit itself the statement that "this permit is issued upon the express condition that the existing buildings and all improvements shall be removed before the work on the filling station is commenced."

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Appropriation from Traction Fund for Lowering Street
Grade Under Elevated and Steam Railway
at Lawrence Avenue.**

May 16, 1925.

HON. JOSEPH B. McDONOUGH, Chairman, Local Transportation
Committee.

Dear Sir:

We respectfully submit the following reply to the communication of your committee in which we are asked to advise the committee "whether an appropriation can be made out of the traction fund to cover the cost of the necessary construction to lower the street grade under the Chicago and Northwestern Elevated, and the Chicago, Milwaukee and North Shore (Chicago, Milwaukee and St. Paul Railway Company) tracks on Lawrence between Broadway and Winthrop avenues." Your letter states that "the depression of the street at this point is a prerequisite to the construction of the Lawrence avenue extension from Broadway to a point 1,100 feet east of Sheridan road."

The "Traction Fund" is a special fund provided for by the Street Railway Settlement Ordinances. Section 25 of the ordinance of the Chicago Railways Company passed February 11, 1907, contains the following language in respect to the origin and purpose of said fund (identical provisions are found in Section 24 of the ordinance of the Chicago City Railway Company, passed February 11, 1907, and Section 22 of the ordinance of the Calumet and South Chicago Railway Company, passed March 30, 1908) :

"On and before the 10th day of April in each year the Company shall come to an accounting and settlement with the said City as of the thirty-first day of January last preceding * * *

"After the deduction from the gross receipts of the items hereinbefore in this Section provided (expenses of operation, expenses of the Board of Super-
vising Engineers, etc.), the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: Forty-five (45) per cent to be retained by the Company and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for license fees, if any, exacted from the Company or its employees.
* * *

"It is further provided that, subject to the action of the City Council of said City, the said City shall deposit the amount so paid to the said City to the credit of a separate fund to be kept and used for *the purchase and construction of street railways by said City*; but any failure to comply with this provision shall in no way affect the rights or obligations of the Company under this ordinance." (Italics ours.)

The only case in which the courts have construed the above quoted provisions from the street railway ordinances is *Barsaloux v. Chicago*, 245 Ill. 598. The City Council had appropriated the sum of fifty thousand dollars from said fund to pay for surveys and other preliminary plans and work looking to the construction of subways for street railway

operation in the central business district of the City. One James G. Barsaloux brought suit as a taxpayer to enjoin the City from using said traction fund or any part thereof to defray the cost of such work. The subways, when constructed, were to be the property of the City, but to be used exclusively by the cars of the street railway companies. The court held the construction of such subways to be the acquisition and construction of street railways within the meaning of the ordinances. Concerning the nature of the traction fund and the purposes for which it may be expended the court said (p. 611):

“The only remaining question requiring consideration is whether the city may use the special traction fund for the purpose of acquiring or constructing subways. Section 24 of the traction ordinance provides that the city shall deposit fifty-five per cent of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purchase and construction of street railways by said city. *Under this ordinance clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund.* The construction of subways is the construction of street railways, and is therefore the identical purpose for which such fund may be used.” (Italics ours.)

The *Barsaloux* case has been cited as authority many times in subsequent decisions of the Supreme and Appellate courts, and we think the courts would be greatly persuaded to follow the rule therein laid down in event any controversy should hereafter arise concerning the purposes for which the traction fund may be expended. It remains therefore to inquire whether said change in the grade of Lawrence avenue to provide sufficient headroom under the railroad viaduct for the construction and operation of the Lawrence avenue street railway extensions amounts to the acquisition or construction of street railways within the meaning of the street railway ordinances and the *Barsaloux* case.

We are of the opinion that the expression “purchase and construction of street railways by the said City” in

the ordinances relates only to the construction or acquisition of local transportation facilities title to which shall be in the City. The Lawrence avenue extension (construction of which is made possible by said change in the street grade) will, when constructed, be a part of the system of street railways owned and operated by the Chicago Railways Company.

We are, therefore, of the opinion that it would not be proper to use the traction fund for that purpose, but the cost of such work should be paid out of whatever funds may be otherwise available for the construction or reconstruction of streets.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Insufficiency of Frontage Consents for Filling Station.

May 20, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We are in receipt of your communication of recent date in which you request an opinion whether a permit to erect tanks for a filling station at 5113-5117 West Madison street should be revoked. The facts, as appearing from the attached correspondence, are that an application for a permit to install two tanks for a filling station at 5113-5117 West Madison street was presented in your office; that the frontage consents were sent to the Superintendent of Maps for examination, and a report was made by the Superintendent of

Maps showing a surplus of 20.93 feet; accordingly the permit was issued; after the permit was issued, a protest was made in the form of two affidavits; one of the affidavits is that of George Kartsunes, who states that he resides at 5110 West Madison street and is the owner of said property, there being 25.85 feet more or less fronting on Madison street; that a petition for frontage consents for this filling station was presented to him for signature and that without realizing the full import and meaning of the petition and not being able to understand English well, the affiant signed the petition; that the affiant now understands the petition and desires to revoke the consent. Another affidavit was filed by Nick Giannulis of 5118 West Madison street who states that he is the owner of property located at the above address, there being 25.85 feet more or less fronting on Madison street; that on or before March 15, 1925, the petition asking his consent to the erection of a gasoline filling station at the southeast corner of Madison street and Leamington avenue was presented at his home for his signature, and that his son, not knowing the import of the petition, signed the affiant's name without knowledge or authority of the affiant.

This office has always taken the position, in regard to frontage consents, that no owner of property can be bound by the consent of some other person, unless the other person acted as the agent of the owner, with authority to sign for him. However, when a person signs an instrument relative to frontage consents in ignorance of the meaning of the same (there being no evidence of fraud or misrepresentation present), this office is of the opinion that such a consent cannot be withdrawn; otherwise, the door would be opened to frauds in that any person could make out an affidavit stating that he did not understand the meaning of the petition which he signed.

Applying the above mentioned rules, the affidavit of George Kartsunes must be ruled out and cannot be considered. The affidavit of Nick Giannulis, however, should be considered and the question is whether sufficient frontage consents are left after the frontage of said Giannulis has been subtracted.

In his affidavit Giannulis states that his frontage amounts to 28.85 feet and this would be sufficient to require a revocation of the permit, since the report of the Superintendent of Maps showed that there was a surplus of but 20.93 feet. However, the report of the Superintendent of Maps also shows that the said Nick Giannulis only owns 12.92 feet of frontage. Since the affidavit is at variance with the report of the Superintendent of Maps, we are inclined to follow the report of the Superintendent of Maps. If, then, we consider the frontage of Nick Giannulis as amounting to but 12.92 feet there is not sufficient frontage subtracted to affect the surplus.

Therefore, in our opinion, this permit should not be revoked, at least until the said Nick Giannulis has clearly demonstrated that he owns more than 20.93 feet of frontage.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Protest Against Permit for Filling Station.

May 20, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your communication of May 16th relative to proposed oil station at 4500-4512 Clarendon avenue.

You enclose a letter from Mr. George Ortseifen, 4518 Clarendon avenue protesting against the issuance of permit to Arthur T. Galt for said station.

One objection made by Mr. Ortseifen is that the signature of Arthur T. Galt on the frontage consent petition (as the owner of property other than that upon which the tanks are placed) is invalid. Mr. Ortseifen contends that the station is being installed by the Apex Motor Fuel Company and that Mr. Galt could not lawfully sign the petition because he received as consideration for his signature the execution and delivery of a lease between himself and the Apex Motor Fuel Company. We do not believe there is anything in that objection of which you should take cognizance. The best answer to it is that the application for the permit is signed by Arthur T. Galt and so is the application for the frontage consents.

Another objection is that the signature of the owners of certain pieces of property to the frontage consent petition are not by the owners themselves but by persons representing themselves as agents of the owners. There is no claim made by Mr. Ortseifen that they were not the agents of the owners, and in the absence of any repudiation by the owners, we do not feel you would be justified in assuming that the said consents were wrongfully signed.

The third objection is that the City Comptroller signed a frontage consent petition on behalf of certain property owned by the City of Chicago in proximity to said gasoline filling station, and that such consent should be disregarded.

The Chicago Municipal Code of 1922, Chapter IV, Section 27, in setting forth the powers of the Comptroller states:

“He shall have supervision * * * over all the property of the City, the purchase, sale or the disposition thereof.”

It has been the practice of the Comptroller to exercise the power. We are not prepared to say that it was wrongfully exercised, in view of the provision of the code which we have quoted above. There do not appear to be any adjudicated cases in point; and since there has been no departure from the established practice on the part of the

Comptroller we do not believe the case before us, where the permit has been already granted and the work nearly completed, is a proper one to bring his act into question.

In view of the above, we do not feel you would be justified in revoking the permit. The papers you enclosed are herewith returned.

Yours truly,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Operation of Ferris Wheel and Merry-Go-Round.

May 20, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have requested an opinion as to whether you should prohibit the operation of a Ferris wheel and merry-go-round at North avenue and Maywood avenue.

From the correspondence attached to your communication, the facts appear to be that an application for an amusement license of Class 18 was made under Section 178 of The Chicago Municipal Code of 1922. Class 18 includes "all entertainments operated by motive power other than animal power, including devices, apparatus, attractions and amusements for the transportation of persons." All the requirements of Section 178 of the code have apparently been complied with, including the securing of the approval of the Building Department, the Zoning Commission and the Department of Gas and Electricity. Frontage consents, as required by the last mentioned section, have also been se-

cured. It seems, however, that Alderman Mills, who represents the ward in which this amusement is to be located, has requested your department to stop the operation of the Ferris wheel and merry-go-round, because there has been no compliance with a council order passed on May 3, 1922 (C. P. 136 of said date), providing as follows:

“Ordered, That the Superintendent of Police and the Commissioner of Public Works be and they hereby are directed not to issue any permit or permits for the operation of a street carnival or for the operation of a merry-go-round, Ferris wheel or like device anywhere within the limits of the City of Chicago without first obtaining the consent to the issuance of any such permit from the aldermen of the respective wards in which it is proposed to conduct any such street carnival or to operate a merry-go-round, Ferris wheel or like amusement device.”

Since the law is well settled that a council order is insufficient to modify, repeal or in any wise alter an ordinance, the above quoted council order cannot be considered in determining the rights of the person desiring to operate this amusement. Since the ordinance regulating applications for permits for amusements of this class has been fully complied with and the permit has been granted, you have no right to interfere with this amusement.

In conclusion, we advise you that the operation of the Ferris wheel and merry-go-round and other entertainments contemplated under the license should be permitted.

Sincerely yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

EDMOND L. MULCAHY,

Acting Corporation Counsel.

Service Credits of Sub-Operators in Police Department.

May 20, 1925.

MR. GEORGE C. SIKES, Secretary, Policemen's Annuity & Benefit Fund.

Dear Sir:

In reply to your letter of May 13th, relative to service credits for sub-operators in the Police Department, the following is submitted:

I am informed by the secretary of the Police Department that sub-operators are taken from the civil service list and assigned to work as needed; that they are temporary appointees subject to being dismissed at any time; and that they are not sworn in as members of the Police Department.

I.

The Police Pension Fund Act of 1887 provides pensions only for those who had been "duly appointed and sworn" and had served upon a regularly constituted police force of a city, village or town for the required time.

No amendment of the Act of 1887 made any change in the description of the person or persons entitled to a pension as hereinabove set out.

II.

The Police Pension Act of 1915 repeats the same description of the person or persons entitled to a pension and restricts the same to those who had been "appointed and sworn" as policemen and had served as such policemen for a specified time.

No change was made in the description of the person or persons entitled to a pension, so far as members of the

Police Department were concerned, by any amendment to the Act of 1915.

In 1921, the Act of 1915 was amended by defining the term "policeman" as used in the Act of 1915, and in such definition included "police operators," but limited the inclusion to those who had been "appointed and sworn or designated by law as a policeman" and had served in a regularly constituted police department; nothing was said in such amendment relative to sub-operators.

III.

The Policemen's Annuity & Benefit Fund Act, Section 1, provides for the creation of a Policemen's Annuity & Benefit Fund "for the benefit of policemen employed by such city and for the widows and children of such policemen, and of all contributors to, participants in, and beneficiaries of, any police pension fund in operation, by authority of law, in such city at the time this act shall come in force and effect in such city."

IV.

The Supreme Court of the State of Illinois, in the case of *The People v. Foreman*, (296 Ill. 487), says, on page 492 of the report:

"It is quite clear, as we have already seen, that the Act of 1887 included every member of the police force by giving a right to a pension to every person duly appointed and sworn and who should serve for the specified term upon the regularly constituted police force regardless of the nature of his service."

On pages 493 and 494, the court, in the same case, stated:

"The Act of 1915, which superseded the Act of 1887 with its amendments, defined the meaning of the word 'policeman' so as to include police operators.
* * * The construction given to the word 'policeman' was not and did not purport to be the creation of any new right, but only a settlement of the question what the legislature meant to include in the term 'police-

man.' * * * The more reasonable conclusion appears to be that the legislative intention was to give a definition or interpretation of the word 'policeman' as used in the series of acts constituting the legislation on the same subject."

V.

It is apparent from the reading of the several police pension acts, and from the cited decision of our Supreme Court, that the right to a pension is granted only to those persons who shall have served the required number of years in the Police Department as members thereof, and that no one is a member of the Police Department, within the meaning of any pension legislation, until he has been "appointed and sworn" as such member. The nature or classification of service appears to be immaterial, but the *sine qua non* of a man's right to be credited with any period of service in the Police Department, appears to be that he must be "appointed and sworn."

I am of the opinion that sub-operators not sworn in as members of the Police Department are not entitled to be credited, for pension purposes, with any period of service rendered by them prior to their having been appointed and sworn as policemen. In other words, so far as concerns police pensions, a person can be working in and for the Police Department and yet not be a member thereof. It is not the character of work he does which makes a man a policeman within the intent of the pension laws; it is his being "appointed and sworn" as a policeman which brings him within the pension laws' provisions.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Form of Complaints for Search Warrants Under Prohibition Act.

May 20, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

The Supreme Court of Illinois, in a very recent opinion in the case of *People v. Anton Elias*, 316 Ill. 376, handed down a decision which creates a precedent relative to the form in which complaints for search warrants under the Illinois Prohibition Act should be prepared. The court, in that case, held that the complaint, in charging a violation of the Prohibition Act, must negative the exceptions of the statute, and further held, that the person swearing to the complaint must be the person who knows *of his own knowledge* that a violation of the act has been committed.

In order to make clear just how the complaint should be worded, we are submitting the following form which should be used in a typical complaint, and suggest that you follow the same, making the ordinary variations necessary to fit the individual case:

"The complaint and affidavit of John Jones, a police officer of the City of Chicago, of..... street, made before..... one of the judges of the Municipal Court of Chicago, on this day of, 192.., who first being duly sworn upon his oath says that he has just and reasonable grounds to believe and does believe that intoxicating liquor is now unlawfully manufactured, kept for sale, possessed, without a permit from the Attorney General or any other authorized public officer so to do, and without the prescription of a physician, and for use for beverage and not medicinal purposes, and not to be used for sacramental or like religious rites, within prohibition territory, to wit: At and within a certain building located at

street, occupied by William Roe of Chicago in said County of Cook, and that the following is this complainant's reason for said belief, to wit:

The said complainant did on day of, A. D. 192..., and on divers other days, buy intoxicating liquor, saw it kept for sale and sold by Wm. Roe in said premises.

Wherefore this complainant prays that a search warrant may issue according to law.

(Signed) John Jones."

Since the above form will, of necessity, have to be changed in order to meet the particular case, it is suggested that in important cases, before making any material changes in the above form, the same be submitted to this office for approval.

Yours very truly,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Distribution of Vest Pocket Memorandum Book Purporting to Contain Medical Information.

May 20, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Replying to your communication relative to whether a certain pamphlet entitled "Vest pocket memorandum book" and which has been widely circulated in the vicinity of Roosevelt road and Wabash avenue, violates the ordinances of the City of Chicago, I desire to reply that, in my opinion, the distribution of this hand book is prohibited by The Chicago Municipal Code of 1922. The book purports to

contain medical knowledge, most of which is in relation to venereal diseases. The purpose of the book is obviously that of acquiring business for a certain doctor, for the name, Dr. Whitney, specialist, 456 South State street, Chicago, is written on every page of the book, and in the preface of the book there is a great deal of advertising matter relative to the claim of Dr. Whitney to cure such diseases. Sections 2671, 2672, 2673, and 2674 of The Chicago Municipal Code provide as follows:

“2671. LITERATURE CONTAINING INFORMATION CONCERNING NATURE OF AND REMEDIES FOR CERTAIN DISEASES—PENALTY.) No person shall sell or offer to sell, give away or offer to give away, distribute or have in his possession, with intent to give away, sell or distribute in or upon any street or sidewalk, or park or public property of the city, any book, pamphlet, circular, handbill, advertisement or notice of any kind purporting to treat of or treating of diseases known as “venereal diseases,” describing or explaining or purporting to describe or explain the genital organs, giving or purporting to give the nature and remedies of diseases peculiar to females, uterine diseases, or the nature or causes of nervous debility, impotency, sterility or barrenness, gonorrhea, gleet, stricture, syphilis, affection of the prostate gland, or the remedies therefor, or the cause or remedies for abortion or miscarriage, or articles or means of preventing conception, under a penalty of not less than twenty dollars nor more than fifty dollars for each offense.

“2672. LITERATURE CONTAINING INFORMATION FROM WHOM OR WHERE MEDICINE TO CURE OR PREVENT CERTAIN DISEASES MAY BE OBTAINED—PENALTY.) No person shall sell or offer to sell, give away or offer to give away, distribute or have in his possession with intent to give away, sell or distribute in or upon any street, sidewalk, park or public property in the city, any book, pamphlet, circular, handbill, advertisement or notice of any kind giving or purporting to give information from whom or where medicine or anything whatever may be obtained for the cure, prevention or treatment of uterine disease, or diseases peculiar to females, venereal disease, or diseases of the genital organs, or nervous debility, impotence, sterility, or barrenness, gonorrhea, gleet, stricture, syphilis, affection of the prostate gland, abortion

or miscarriage, or articles or means of preventing conception. Any person, firm or corporation violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.

“2673. ADVERTISEMENT GIVING INFORMATION CONCERNING CERTAIN DISEASES OR CONDITIONS PROHIBITED—PENALTY.) It shall be unlawful for any person to advertise, print or publish, or cause to be advertised, printed or published in any newspaper or other publication having a general circulation in the city, or which is sold or offered for sale within the city, any advertisement, notice or mention of any kind whatsoever, giving or purporting to give any information of, from whom, or where apparatus, medicine, remedies or alleged cures may be had or obtained for the cure, prevention or treatment of uterine diseases, or of diseases peculiar to females, or of venereal diseases, or of diseases of the genital organs, or of nervous debility, impotence, sterility or barrenness, or of gonorrhea, gleet, stricture, syphilis, or affections of the prostate gland, or from whom, or where, may be obtained any advice, information, direction or knowledge of any drug, medicine, mixture, preparation, instrument, apparatus, or means of any kind whatever for the purpose of causing or procuring a miscarriage by any woman pregnant with child, or for the purpose of causing or producing an abortion, or for the purpose of preventing conception. Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.

“2674. ADVERTISING QUACK NOSTRUMS—PENALTY.) No person shall place or post or cause to be placed or posted, in any street or other public place in the city any handbill or advertisement giving notice of any person having or professing to have skill in the treatment or curing of any disorder or disease, or giving notice of the sale or exposure for sale of any nostrum or medicine, under a penalty of not more than twenty-five dollars for each offense.”

We advise you that the above mentioned pamphlet violates the above mentioned sections of the code, and that all persons distributing or aiding the distribution of said pamph-

let or who print or publish said pamphlet should be prosecuted under the sections of the code aforesaid.

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

License for Operation of Bus on Irving Park Boulevard.

May 22, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of April 22d requesting this office for an opinion as to the propriety of the issuance of a license to one William Vander Hayden to "operate a bus on Irving Park boulevard from 6400 west to 7400 west and down 74th avenue to Belmont avenue" is received.

It is difficult to determine the character of the service sought to be rendered by the applicant from his communication. We are unable to say that the operation of such bus would characterize the vehicle as a public utility and consequently within the jurisdiction of the Illinois Commerce Commission. A common carrier is not necessarily a public utility and thus subject to the supervision and jurisdiction of the commission. However, the following general rules may be observed. Any common carrier of passengers for hire operating over fixed routes on a fixed schedule for a uniform rate of fare is a public utility within the meaning and intent of the Commerce Act and must procure a certificate of public necessity and convenience from the Commerce Commission before it can legally operate over any of the public highways of the City. In addition to this require-

ment, Sections 2761 and 2762 of the municipal code declare that it shall be unlawful for any person, firm or corporation to operate motor busses as common carriers on any street or public highway in the city of Chicago without first having obtained a specific grant of authority in the form of an ordinance from the City Council. It will be seen from this latter provision that the power to authorize such operation so far as the City is concerned is specifically reserved to the City Council and that none of the other administrative departments of the City government have any authority to issue any license or permit for the operation of motor bus service.

The provisions of the code referred to are operative without reference to whether or not the carrier is a public utility within the jurisdiction of the Commerce Commission, except as the conditions of any ordinance that might be granted should clothe the carrier with the attributes of a public utility and thus bring the carrier within the jurisdiction of the commission.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Reinstatement of Health Department Employee After Leave of Absence.

May 27, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We are replying to your inquiry of the 18th instant as to what action should be taken upon the application of Frederick W. Gibson for reinstatement in his civil service position in your department. The facts are stated to be that

Mr. Gibson, while acting as food inspector, took leave of absence June 30, 1924, which was twice extended. The last period of leave expired May 21, 1925, on which date formal written application for reinstatement was made by Mr. Gibson to you as head of the department.

You quote Section 4 of Rule 8 of the Civil Service Commission, which provides that:

“Upon the expiration of a leave of absence, an officer or employe shall report to the head of his department and be reinstated in his position unless the position in the meantime has been filled by certification from an eligible register, then he shall be reinstated only when a vacancy in a position of the same branch, class, grade or rank and character of work and approximate salary exists and in order of his seniority of certification.”

You state that “at present all of the positions are filled by civil service employes.” However, upon inquiry made to your department, I learn that two of these positions are filled by temporary appointees. As by the terms of the quoted rule the civil service employe is entitled to reinstatement “unless the position in the meantime has been filled *by certification from an eligible register*,” the applicant in this case is entitled to reinstatement to his position, and a temporary appointee must give way. In determining whether a position remains unfilled or a vacancy exists in the civil service, temporary appointees may not be counted. Nor does the fact that the applicant during his leave of absence received disability benefits change the application of the foregoing rule of reinstatement.

We are therefore of the opinion that reinstatement of the applicant should be made as requested and such reinstatement reported to the Civil Service Commission.

Very truly yours,

FRANCIS J. VURPILLAT,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Resolution Directing Appropriation of Money for State Apportionment.

May 28, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You submitted to this department a resolution introduced in the City Council by Alderman Guy Guernsey which contemplates the appropriation of a sum of money to be turned over to the Constitutional Apportionment Legion for the purpose of carrying on the campaign for a proper reapportionment of the state in accordance with the terms of the Constitution. You ask whether the City Council has the power to comply with this resolution.

So far as the general proposition of reapportionment is concerned, we believe the City as a municipality has a real interest in securing proper representation for its people in the General Assembly, especially in view of the fact that the City must look to the General Assembly for legislation which will enable it to function properly as a municipal corporation. (*Meehan v. Parsons*, 271 Ill. 546.) Hence, this constitutes such a public purpose that the appropriation of money therefor comes within its powers, and the only question is whether such money can be turned over to a non-official agency to be expended within its discretion. We do not think this can be done.

However desirable the services of a private corporation or private agency of any kind may be in connection with public business, the payment of money to it except for services rendered and duly appropriated for amounts to a donation which is contrary to Separate Section 2 of the Constitution.

Washingtonian Home of Chicago v. City of Chicago,
157 Ill. 414.

Our conclusion is that if a legitimate expense is incurred by any one who is the agent of the City of Chicago in this behalf, the City is not prohibited from making payment therefor, but to make an appropriation and turn it over to be spent by an individual who is not acting as an officer of the City, or by an agency which is not a department, bureau, division or other official branch of the government, would be contrary to law.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proper Classification for Four - Story Apartment Building.

May 28, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of May 8th. You wish to be advised whether under The Chicago Municipal Code of 1922 a four-story apartment building should be construed as being in Class IIb or Class VI.

As we understand it, the building consists of eight apartments rented to eight different lessees. In each case the lessee rents out rooms to five occupants, making a total of forty roomers in the building.

Each of the eight lessees has full control over the flat which he leases, collects rent from each of the five roomers and furnishes light, heat, linen and other necessities for his

flat. He also maintains cooking facilities for his own use, but the roomers in the flat are provided with sleeping accommodations only.

The Municipal Code of 1922 provides as follows:

“*Article V, Section 467, Paragraph (c)*—In class IIb shall be included every building used for hotel, club, lodging or rooming house purposes, where such building has sleeping accommodations for twenty or more persons.”

Article IX, Section 632 of the Municipal Code of 1922 provides as follows:

“632. *Class VI defined.*)—In Class VI shall be included every tenement and apartment house or building, or portion thereof, which is used or intended to be used as a home or residence for two or more families living in separate apartments.”

The question presented by your letter is not free from difficulty, but a reasonable interpretation of the ordinance would seem to suggest that a building such as you describe would not be a rooming house and used for rooming house purposes within the provisions of the ordinance. Its primary use would seem to be for apartment house purposes.

That the lessees of the different apartments in the building may make a practice of renting out rooms in the structure would not in itself make it a rooming house. If we were to so construe the ordinance, it would be very difficult to draw the line, as in a great many apartments and residences throughout the city rooms are rented out by the week or the month.

What is meant by a Class IIb building used for rooming house purposes, under the ordinance, in our judgment is a building the predominant use of which is for rooming house purposes, but not where such use is incidental, as in this case, to the apartment use.

As we understand it, the lessee of each flat maintains in said flat a complete housekeeping unit for himself, and the renting out of the rooms is not the primary purpose of the occupancy of the flat.

The situation, of course, would be different if the owner or lessee of the building conducted the building completely as a rooming house, had a master key to all the rooms and was making of the premises a rooming house as that term is commonly understood.

While we could easily imagine a case where the owner of an apartment building might lease the eight apartments to separate persons as a matter of subterfuge in evading the provisions of the ordinance so as to in reality conduct a rooming house, yet we could hardly assume that such is the fact.

A case involving a question somewhat similar to the one you present is now pending before the Supreme Court, and the decision in that case may throw some light on the problem. Pending that decision, however, we think it preferable to construe the eight apartment building which you describe as a Class VI building, rather than a Class IIb building.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Age of Policeman Given in Application for Appointment.

May 28, 1925.

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND
BENEFIT FUND.

Gentlemen:

At the meeting of your Honorable Body held May 8, 1925, there were referred to me two communications from the Civil

Service Commission; the first being a copy of an order entered in the minutes of the Civil Service Commission of April 28, 1925, for transfer to the Police Pension Fund, relative to change of date of birth in the application of one Arthur McGuire; and the second being relative to change of date of birth in the application of one Francis P. Larkin. This reference was made with a request for an opinion as to the action to be taken by your Honorable Body in connection therewith.

Section 59 of the present Policemen's Annuity & Benefit Fund Act provides as follows:

"In the case of any policeman who shall have filed an application for appointment as a member of the Police Department of such city, the age stated in such application shall be conclusive evidence of the age of such policeman for the purposes of this act."

I do not construe the above provision of the act to mean strictly the age stated in the application blank in connection with appointment as a member of the Police Department. The age as written on the application blank might be an unintentional misprint, or an honest error, or an intentional misrepresentation, either one of which is subject to correction by the Civil Service Commission.

The Civil Service Commission is a body separate, apart and distinct from your Honorable Body, and the laws regulating and rules governing the Civil Service Commission are solely for the regulation and guidance of that body in the keeping of its records and performance of its other duties.

I am of the opinion that in the absence of actual fraud or apparent error it is the duty of this board to accept the records of the Civil Service Commission as such records may be at the time your Honorable Body may have occasion to use the same, and that any changes made in or on the records of the Civil Service Commission, relative to the date of birth of any applicant for appointment as a member of the Police Department of the City of Chicago, is binding

upon your Honorable Body, for the purposes of the Policemen's Annuity & Benefit Fund Act.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Deductibility of Income Taxes from Joint Account of the Chicago Surface Lines.

June 1, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir :

In our communication of August 24, 1925, we said :

“The Federal Government has, since 1916, levied an excise tax against corporations upon the privilege of doing business as a corporation. While we have so far found no authorities upon this point we are of the opinion that this tax is not included in the term ‘all capital stock or franchise taxes’ and should not be deducted by the companies.”

The authorities sustain the opinion we expressed in that communication. The act of Congress of September 8, 1916, imposing this tax provided :

“Every corporation, joint stock company, or association, now or hereafter organized in the United States for profit, and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any state or territory of the United States, shall pay annually a special excise tax with respect to the carrying on or doing business by said corporation, joint stock

company, or association, or insurance company, equivalent to 50 cents for each \$1,000 of the fair value of the capital stock, and in estimating the value of capital stock the surplus and undivided profits shall be included. * * *

It will be observed that the tax imposed by this act does not purport to be a tax on the capital stock or the franchise of the corporation, but upon the privilege of carrying on or doing business by the corporation. The measure of the tax is the amount of the capital stock, but it is not the capital stock or the franchise that is taxed.

In 1909 the Congress of the United States passed an act providing that:

“Every corporation, joint stock company, or association, organized for profit and having a capital stock represented by shares, and every insurance company now or hereafter organized under the laws of the United States or of any state or territory of the United States, * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company, or association, or insurance company, equivalent to 1 per centum upon the entire net income, over and above \$5,000, received by it from all sources during such year. * * *

It will be noticed that the two acts are almost identical in language, except that the Act of 1909 made the income of the corporation the measure of the tax, while in the Act of 1916 it is provided that the tax shall be measured by the amount of the capital stock.

In *Flint v. Stone Tracy Co.*, 220 U. S. 107, the validity of the act was questioned, it being contended that the tax was a direct tax upon the franchise of the corporation. The court, however, held it was not a tax upon the franchise, but an excise imposed upon the privilege of doing business. In the course of its opinion the court said (on page 145):

“While the mere declaration contained in a statute that it shall be regarded as a tax of a particular character does not make it such if it is apparent that it cannot be so designated consistently with the meaning

and effect of the act, nevertheless the declaration of the lawmaking power is entitled to much weight, and in this statute the intention is expressly declared to impose a special excise tax with respect to the carrying on or doing business by such corporation, joint stock company or association, or insurance company. It is therefore apparent, giving all the words of the statute effect, that the tax is imposed not upon the franchises of the corporation, irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business, and with respect to the carrying on thereof, in a sum equivalent to 1 per centum upon the entire net income over and above \$5,000 received from all sources during the year; that is, when imposed in this manner it is a tax upon the doing of business, with the advantages which inhere in the peculiarities of corporate or joint stock organization of the character described. As the latter organizations share many of the benefits of corporate organization, it may be described generally as a tax upon the doing of business in a corporate capacity. In the case of the insurance companies, the tax is imposed upon the transaction of such business by companies organized under the laws of the United States or any state or territory, as heretofore stated.

“This tax, it is expressly stated, is to be equivalent to 1 per centum of the entire net income over and above \$5,000 received from *all sources* during the year,—this is the measure of the tax explicitly adopted by the statute. The income is not limited to such as is received from property used in the business, strictly speaking, but is expressly declared to be upon the entire net income above \$5,000 from all sources, excluding the amounts received as dividends on stock in other corporations, or insurance companies also subject to the tax. In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. This view of the measure of the tax is strengthened when we note that as to organization under the laws of foreign countries, the amount of net income over and above \$5,000 includes that received from business transactions and capital invested in the United States, the territories, Alaska, and the District of Columbia.”

In *McCoach v. Minehill & SchuylkillHaven Railroad Co.*, 228 U. S. 296, it was held that the tax levied by the Act of 1909 was not a tax upon the franchise of the corporation, and therefore a railroad corporation which had leased its entire railroad, with all its rights, powers, privileges and franchise, for a term of years at an annual rental, and which did no other business than to receive the income from its leased railroad and interest and dividends from certain invested funds, bank balances, and the like, and the payment of organization and administration expenses incidental to the receipt of such moneys and other distribution among the stockholders, was not doing business within the meaning of the said Act of 1909, and was not subject to the excise imposed by that act.

In the *United States v. Whitridge*, 231 U. S. 144, it was held that the income derived from the management of city railway lines operated by receivers appointed by the court was not subject to the tax imposed by the Act of 1909, because the business was not being carried on by the corporation. The court said (page 149):

“A reference to the language of the act is sufficient to show that it does not in terms impose a tax upon corporate property or franchises as such.”

It is quite clear from these cases that the tax imposed by the Act of September 8, 1916, is not a capital stock or franchise tax, but is an excise levied under the authority granted to Congress by the first paragraph of Article 1, Section 8 of the Constitution of the United States, to “lay and collect * * * duties, imposts and excises * * *” and that the companies were not authorized to deduct the amount of such tax from the receipts of the companies before division of the net receipts between the City and the companies was made.

Respectfully submitted,

WILLIAM H. HOLLY,

Approved: *Special Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

**Classification Under Building Ordinances of Chapel
Operated in Connection With Undertaking
Establishment.**

June 1, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of recent date. You wish to be advised in what classification a chapel operated in connection with an undertaking establishment should be placed under the building ordinances.

The dictionary defines a chapel to be (1) a subordinate place of worship forming an addition to or a part of a large church or a cathedral, but separately dedicated, and devoted to special services; (2) a separate building subsidiary to a parish church; (3) a small independent church-edifice devoted to special services.

While from the definitions in the dictionary a chapel is ordinarily a place devoted to worship, yet a chapel in connection with an undertaking business is not absolutely and universally used for such purposes. Such a chapel is more often used as a meeting place for the friends and relatives of the deceased after the death and until the funeral. While such a chapel in connection with an undertaking establishment is not enumerated specifically in the various classifications of buildings, we think that a building containing such a chapel in connection with an undertaking establishment falls within Class IVb, which reads as follows:

“In Class IVb shall be included every building having a parish hall, lodge hall, dance hall, banquet hall, skating rink, assembly halls, halls used for the purpose of exposition and exhibition, and buildings having a hall for the purpose of instruction other than schools included in Class VIII, and also every existing building having

a hall used for theatrical purposes at the time of the passage of this ordinance, except such buildings as are included in Classes IVa, IVc, IVd, and V."

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Signatures to Be Attached to Certificates Issued by Board of Examiners of Plumbers.

June 2, 1925.

BOARD OF EXAMINERS OF PLUMBERS.

Gentlemen:

In a communication of even date you have advised this office that Health Commissioner Bundesen, who is chairman, ex-officio, of your board, has refused to sign the certificates issued to applicants who desire to engage in the business of plumbing, and you desire to know whether the Master Plumber member of the board and the Journeyman Plumber member of the board have the power and authority to sign and issue the certificates without the signature of the Health Commissioner.

The authority of the City to appoint a Board of Examiners of Plumbers is derived from a statute known as "An Act to provide for the licensing of plumbers and to provide for the supervision and inspection of plumbing, etc.," in force July 1, 1917. Section 3 of said act provides as follows:

"Section 3. That there shall be in every city, town or village of 10,000 inhabitants or more, a board of ex-

aminers of plumbers, consisting of three members, one of which shall be the chairman of the board of health, health officer, or commissioner of health as the case may be, who shall be ex-officio chairman of said board of examiners; a second member who shall be a master plumber and a third member who shall be a journeyman plumber. Said second and third member (members) shall be appointed by the mayor and approved by the city council or city commissioners, or board of trustees of said town or village, within three months after the passage of this act for the term of one year from the first day of May in the year of appointment and thereafter annually before the first day of May and shall hold office until their successors are appointed and shall be paid from the treasury of said city, town or village, the same as other officers in such sums as the authorities may designate.”

The meeting of the Board of Examiners and issuing of certificates and applications for certificates are provided for in Sections 4 and 6 of such act as follows:

“Section 4. Said board of examiners shall, as soon as may be after appointment, meet and then designate the dates and places for the examination of all applicants desiring to engage in or to work at the business of plumbing within their respective jurisdiction. Said board shall examine said applicants as to their practical knowledge of plumbing, house drainage and plumbing ventilation and if satisfied of the competency of such applicant shall thereupon issue a certificate to such applicant authorizing him to engage in or work at the business of plumbing, whether as a master plumber, employing plumber, or as a journeyman plumber.

The fee for a certificate for a master plumber or employing plumber shall be \$50; for a journeyman plumber the fee shall be \$1. Said certificate shall be valid and have force throughout the state for a period of one year from date of issuance and may be renewed upon its expiration by payment in advance of an annual renewal fee of \$10 for the certificate of a master plumber or employing plumber and the payment in advance of an annual renewal fee of \$1 for the certificate of a journeyman plumber. All certificate and renewal fees received for said certificate to be paid into

the treasury of the city, town or village where said certificate is issued: *Provided, however*, that all such persons residing outside of a city, town or village, having a board of examiners of plumbers shall pay their fees for renewal to the Department of Registration and Education as provided in Section 6 of this act."

"Section 6. All persons who are required by this act to take examinations and to procure a certificate as required by this act, shall apply to the board of examiners of plumbers in the city, town or village where he resides: *Provided, however*, an applicant residing outside of a city, town or village having a board of examiners of plumbers, shall apply to the board of examiners of plumbers nearest his place of residence: *Provided, however*, that all such persons who reside outside a city, town or village having a board of examiners of plumbers, shall apply to and receive his renewal certificate from the Department of Registration and Education, and he shall pay the renewal fee as provided for herein, to the Department of Registration and Education. All fees received by the Department of Registration and Education for such renewals shall be paid into the state treasury. It shall be the duty of such board of examiners of plumbers in such cities, towns or villages, to furnish the Department of Registration and Education with the name and address of each person who may apply or to whom it has issued a certificate, or a renewal certificate within thirty days from the date of issue of said certificate."

Pursuant to the authority granted by the above statute, the City Council passed an ordinance which is contained in Sections 2938 to 2945 of The Chicago Municipal Code of 1922, providing for the creation of a Board of Examiners of Plumbers. Section 2940 of said code provides as follows:

"2940. BOARD OF EXAMINERS OF PLUMBERS.) There is hereby created a board of examiners of plumbers, consisting of three members, one of whom shall be the commissioner of health, who shall be ex-officio chairman of said board of examiners, a second member of which board shall be a master plumber, and a third member who shall be a journeyman plumber. Said second and third members shall be appointed by the mayor, by and

with the advice and consent of the city council. Each of said second and third members so appointed shall, before entering upon the duties of his office, execute a bond to the city in the sum of five thousand dollars, with sureties to be approved by the city council, conditioned for the faithful performance of the duties of the office to which he has been appointed."

Section 2942, of said code, provides as follows:

"2942. POWERS OF BOARD—CERTIFICATES—FEES.) Said board shall examine applicants as to their practical knowledge of plumbing, house drainage and plumbing ventilation, and if satisfied as to the competency of any such applicant, and upon payment by such applicant to the city collector of the fee hereinafter provided for, shall issue a certificate to such applicant authorizing him to engage in or work at the business of plumbing as master plumber, employing plumber or as a journeyman plumber, as the case may be, and according to the terms of the application made by such applicant. The fee for the examination and certificate of a master plumber or employing plumber shall be fifty dollars, and for the examination and certificate of a journeyman plumber, one dollar. Such certificates shall be valid and in force for a period of one year from the respective dates of issuance thereof and may be renewed upon their expiration by the payment in advance of an annual renewal fee of ten dollars for the certificate of a master plumber or employing plumber, and the payment in advance of an annual renewal fee of one dollar for the certificate of a journeyman plumber. All the fees received for said examinations and certificates shall be paid into the city treasury."

Under the statute and ordinance passed pursuant thereto, the Health Commissioner of the City is made chairman, ex-officio, of the Board of Examiners of Plumbers. It is made the duty of the board to examine applicants for certificates and to issue certificates to such applicants as successfully pass the examination.

In your communication, you state that the Health Commissioner, since the year 1893, has taken no part in the

proceedings of the Board of Examiners, but has continued to sign the license certificates so that the signatures of all three members have, in the past, always been placed upon the certificates. Now, however, Health Commissioner Bundesen has refused to place his signature upon the certificate on the ground that he is not familiar with the proceedings of the board and therefore does not care to have his signature upon the certificate.

Since the Health Commissioner is made a member of the board, both by statute and ordinance, and since the duty is clearly placed upon him to act as chairman of the board, it is his duty to take part in the proceedings of the board. Since the ordinance requires that the certificate should be issued by the board, the signatures of all three of the members, including that of the Health Commissioner, should appear on the certificate. The Health Commissioner has informed the writer that for many years it has been the custom of the Health Commissioner of the City of Chicago to sign these certificates in blank. Commissioner Bundesen further states that this practice was continued without his knowledge, by the employes of his office after he became Health Commissioner, and it was only recently that he became aware of the practice. Not being advised that the law required him to act as chairman of said board, he declined to sign the certificates until such time as he was informed by the Corporation Counsel of his legal duties in this regard. This office is in receipt of a communication from Commissioner Bundesen, requesting that the Corporation Counsel render an opinion relative to the duties of the Health Commissioner in connection with the signing of these certificates. We feel sure that so soon as the Health Commissioner is advised relative to his duties, he will act accordingly.

In conclusion, it is the opinion of this department, that the Health Commissioner should place his signature upon the certificates as well as the Master Plumber of the board and the Journeyman Plumber member of the board. The

Health Commissioner should also act as chairman of the board and should preside at the meetings of the board.

Very respectfully,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Licensing of House to House Canvassers, Solicitors,
Etc., and Licensing of Booking Agents, Play
Brokers, Etc.**

June 5, 1925.

JAMES E. TODD, Esq., Secretary, Revenue Commission.

Dear Sir.

In your letter of recent date you inquire whether the City has power to license house-to-house canvassers, solicitors, etc. Attached thereto is a copy of an ordinance of the City of Minneapolis requiring such license from that class of persons. We gather from your letter and the sample ordinance that you have in mind the person who takes orders for future delivery.

The City has no power to require a license from the precise class that you mention when considered generally, although it may be that in many instances such a person will come within the definition of a broker, or will sell some article over which the licensing power exists, such as provisions or liquors, in which event his business may come within the regulatory powers of the City and may be licensed. If he actually delivers the goods, even though he may not do so at the time he takes the orders, he may come within the definition of a peddler (Clause 41 of Sec. 1, Art.

V), or within the power granted over itinerant merchants and transient vendors of merchandise by the Act of June 16, 1887 (Cahill, 1923, Ch. 24, Sec. 625). The person who merely solicits, however, and transacts his business within the houses and not on the streets, even though he may canvass from house to house, is not within the licensing powers of the City.

As to booking agents for actors and entertainers, play-brokers, etc., there does not appear to be anything in the statutes granting authority over amusements which would give the City the right to impose a license fee. The word "play-broker" does not imply a broker in the dictionary sense of the word.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Claim of Infringement of Patent in the Installation of Street Traffic Signal Lights.

June 5, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

My Dear Colonel:

You requested from this office an opinion as to the claim of infringement by the City of patent No. 1,490,567, issued to Kleinsteinuber *et al.*, April 15, 1924.

This matter was referred to Mr. Otto M. Wermich, a specialist in patent law, who, under date of June 3, 1925, returns the following opinion:

"The patent contains 10 claims. The structures therein defined have been examined and compared with signalling devices such as employed along Michigan avenue and at Jackson boulevard, and that located at Irving Park boulevard and Clarendon avenue.

No claim is made by Kleinsteuber *et al.* for any particular mechanism for actuating the signals, the claims being all directed to the relative arrangement of the colored lights, the period at which the signal lights are operated, and compartments of a certain character in which lamps are located. A blue print herewith attached and marked Exhibit 'A' showing a plurality of signal lights arranged lengthwise of the four sides of a casing, with a reflector and a lamp arranged in each reflector in rear of each signal light exemplifies structures such as those examined and located at the above mentioned streets. A structure such as that illustrated in the print avoids claims 1, 2, 3, 4, 5, and 8 because these claims are specific to 'separate compartments having a lamp in each compartment,' and each compartment having 'stop' and 'go' information. In other words, each of the compartments formed by one of the reflectors and one of the colored signals in the device employed by the City does not have both 'stop' and 'go' information and, therefore, structures such as that of the print are not infringed by the above enumerated claims 1 to 5 and claim 8.

By referring to the drawings of the patent, and particularly figures 1, 2 and 10, it will be seen that box-like compartments arranged one above the other are employed and that the opposed walls of the respective compartments are respectively provided with 'stop' and 'go' information, the compartments each having a lamp located therein. Claims 1 to 5 and claim 8 cover a specific construction such as that above outlined, and in view of the fact that the signal utilized by the City does not employ a structure similar to that above described, no infringement exists.

The validity of even these specific claims is very doubtful, especially in view of the patent to Skeen, 574,-954, January 12, 1897, which shows two compartments with side panels, the side panels of each compartment being provided with traffic 'stop' and traffic 'go' information, and a lamp in each compartment. To add another compartment and another lamp to indicate traffic 'change' is not invention in view of the patent to

Orcutt, No. 856,095, June 4, 1907, which shows and describes a three-light signalling device, one a cautionary 'signal.' This last mentioned Orcutt patent was overlooked by the patent office during the prosecution of the Kleinsteuber application, and in view of the fact that claims, 6, 7, 9 and 10 read upon this patent and Skeen's claims such as 6, 7, 9 and 10 should not have been granted Kleinsteuber.

An analysis of claim 6 and a comparison thereof with the device shown in either figure 3 or 4 of the Orcutt patent will conclusively show that this claim is entirely too broad and covers more than Kleinsteuber is entitled to in view of the prior art as contained in the patent office.

The first element defined in claim is a *crossing signal comprising a plurality of compartments including means for conveying 'traffic stop' and 'traffic go' information.* This is found in the box-like arms B and C respectively containing red and white lights 15 and 17.

The next element specified in this claim is *'another compartment including means for conveying traffic change information.'* This last mentioned means is found in the box-like arm or compartment E containing one or more colored lights 30.

The next element specified in this claim is *'means for alternately illuminating the "stop" and "go" compartments and for illuminating the "change" compartment after each illumination of the stop and go compartments.'* This feature is shown and designated at 5 and 22 in figures 3 and 4, numerals 5 and 22 designating switches for controlling the illumination of the lights 15, 17 and 30. These switches 5 and 22 constitute the means for illuminating the 'stop' and 'go' compartments and the 'traffic change' compartment.

When the switch 5 is in the position shown in figures 3 and 4, current flows from the motor 6, through line 7, through armature 24, terminal 25, armature 9 of magnet 1, through terminal 10, lead 14, lamps (traffic stop) 15, and line 8, thus illuminating lamps 15 in box-like arm B. Upon actuation of switch 5, magnet 1 is energized, drawing armature 9 of magnet 1 against terminal 11, closing the circuit. Current will then flow from motor 6, line 7, armature 24, terminal 25, armature 9, terminal 11, lead 16, lamps 17 (go information), line 8 and motor 6. Thus a means is provided for *alternately illuminating traffic stop and go compartments.*

The means for illuminating the *traffic change* compartment after each illumination of the traffic go and stop signal is shown at 22 in the patent to Orcutt and consists of a switch which, when open, permits the stop and go signals to be operated at will. Upon the closing of this switch 22, the magnet 23 is energized, causing its armature 24 to contact with the terminal 27, which causes current to flow from the motor 6, line 7, armature 27, lead 28, light 30 (traffic change), arm E, lead 8, and back to the motor. The switches 5 and 22 *provide the means for alternately illuminating the stop and go compartments, and for illuminating the 'change' compartment after each illumination of the stop and go compartments.*

This claim 6 is void because of anticipation by the patent to Orcutt, No. 856,095, patented June 4, 1907.

Claim 7 is void for anticipation because met in the combination of the structure shown in Skeen, 574,954, January 12, 1897, and the patent to Orcutt above cited, as it would not amount to invention to employ a third signal with Skeen and operate it in the manner disclosed by Orcutt who discloses the idea of a cautionary signal in combination with 'stop' and 'go' signals.

Claim 7 calls for *'a set of signal devices arranged to simultaneously permit traffic to proceed in one street and restrain traffic on an intersecting street.'*

The Skeen patent shows two compartments (Figs. 1 and 2), each having a light or lamp provided therein. Each compartment has four walls; the walls of the compartments are formed of red and green glass, opposed walls being respectively of red, the transverse walls being green. Thus, this will meet the above portion specified in the claim.

The next part of the claim specifies *'a second set of signals reversely arranged.'* This feature is met in the lower compartment of the Skeen device because the red and green window lights are, as shown in figure 2, arranged reversely to the upper red and green window lights. Thus, the second portion of the claim is met.

'The means for alternately displaying the sets of signal devices to change the flow of traffic' specified in this claim is without doubt shown in the switches 5 and 22 of Orcutt.

To meet the next feature expressed in this claim, to wit *'a traffic change signal visible in opposite directions along each street,'* one would have to supply an-

other chamber such as shown in Skeen and illuminate it as disclosed by Orcutt.

The last element of the claim, '*means for illuminating the traffic change signal in advance of each change of traffic signals,*' is also shown to be old in Orcutt. This claim 7 is entirely too broad, is therefore met, is without invention over the prior art and is invalid.

Claim 8 not infringed for reasons previously advanced.

Claim 9 is similar in substance to claims already discussed, differing from previously referred to claims in that it specifies that the third signal is visible in *all directions*. A signal visible in four directions is not visible in all directions, and therefore a four-sided third signal avoids this claim. If it is argued that a four-sided signal meets the terms of claim 9, then the claim is invalid for want of invention over the Skeen patent combined with Orcutt, as pointed out in the discussion of claim 7. Claim 9 further differs from claims 7 and 8 in that it specifies a means for illuminating the traffic change signal *between* the illumination of the 'stop' and 'go' signals, whereas claims 7 and 8 call for the operation of said 'change signal' in *advance* of the 'stop' and 'go' signal. This claim calls for *means* for accomplishing this feature. The patent to Orcutt shows a *means* for accomplishing this end. This claim is void for want of invention over the patents to Skeen and Orcutt. Furthermore, it is *not infringed* because the alleged infringements do not employ a signal visible in all directions.

Claim 10 is void for want of invention over the device shown in the patent to Skeen in combination with the structure shown in Orcutt. This claim 10 specifies a pair of reversely arranged signal devices adapted to alternately and simultaneously permit traffic to proceed in one street and restrain traffic on an intersecting street. This arrangement is found in the patent to Skeen.

The device of Skeen is *adapted* to accomplish the alternate illumination of the signals after the lapse of a time interval as specified in this claim. Therefore, no invention is thus far expressed in this claim.

The next feature specified is a 'traffic change signal and *means* for illuminating the traffic change signal during said time interval.' It will be noted that the patent to Orcutt shows a *means* for illuminating a 'cautionary' or 'traffic change' signal which could, without

the exercise of the inventive faculties, be combined with Skeen to accomplish all that this claim calls for.

It will be noted that the broader claims 6, 7, 9 and 10 are not limited to the use of *automatic* means for accomplishing the illumination of the traffic control signals or the traffic change signal and therefore they are invalid because they can be read directly upon the Orcutt structure.

It is further submitted that the claim of Kleinstaub could be easily met by Orcutt as it would not amount to invention to mount the box-like arms B, C and E one upon the end of the other and arrange red, green and white lights or lenses therein, especially in view of the fact that red and oppositely disposed green lenses are employed in railroad lamps. The Orcutt patent clearly teaches the use of a third light for precautionary purposes, and the patent shows a *means* whereby the red, green and white lights may be operated to actuate, stop, go and a third light for any desired purpose. As before stated, the broader claims do not recite '*automatic means*' for accomplishing the display of stop, go and caution signals and therefore the broader claims are met in the Orcutt patent.

In *Universal v. Sonn*, 154 Fed. 655, 83 C. C. A. 442; *Keystone v. Phoenix*, 95 U. S. 274; *National v. Williams*, 44 Fed. 190, the court said, "We must construe the patent in the light of what it says, not what it might have said; we must hold the patentee to what he has put on paper, not what he may have had in his mind. It is enough that the patentee did not so word the claim and it is beyond the province of the court to rewrite it."

In *Burt v. Ivory*, 133 U. S. 349; *Florsheim v. Schilling*, 137 U. S. 77-1890; *Morgan Envelope Co. v. Albany Paper Co.*, 40 Fed. 582-1889; *Mahon v. McGuire Mfg. Co.*, 51 Fed. 681-1892, it was held not to amount to invention to combine old devices (Skeen and Orcutt) into a new machine or manufacture or design without producing any new mode of operation.

It is a fundamental rule of patent law that a publication (patent) published prior to the date of a patentee's invention anticipates, no matter whether the patentee knew of such publication or not. *DeLamar v. DeLamar Min. Co.*, 110 Fed. 538; *Millett et al. v. Allen, Com. of Pats.*, 124 O. G. 1524.

In *American Laundry Machinery Mfg. Co. v. Troy Laundry Machinery Co.*, 171 Fed. 870-877, it was held

that if ordinary mechanical skill is adequate to make selection of elements from machines in the prior art and their union or combination in a new machine, operating in the old way and accomplishing the same result, although it may be an improved result, and no new idea is involved in the process, there is no patentable invention, however great the improvement.

In *Lowden Machinery Co. v. Janesville Hay Tool Co.*, 141 Fed. 986, Judge Sanborn of this district held that where all the elements appear in the prior art, and each performs its old function, the patent is without novelty or invention and should be held void.

In conclusion, it is submitted that claims 1 to 5 and 8 are not infringed by a construction such as that illustrated in Exhibit "A," and claims 6, 7, 9 and 10 are invalid, they being too broad in view of the prior art.

Prior Art.

Attention is called to the prior art patents to Roderick 1,123,925, Jan. 5, 1915; Ghigliere, 1,224,632, May 1, 1917, particularly lines 114 to 127 of page 3.

Ghigliere discloses in lines 114 to 127, page 3, an arrangement, which, if followed, will accomplish the same end or result by a two colored light structure as is now accomplished by a three light system. This patent does not contain any claim which would prevent the use of a purely automatic signalling system, is prior to Kleinsteuber, and therefore a suit could not be predicated upon Kleinsteuber. By the structure, oppositely disposed pairs of red and green lamps or signals may be employed which are alternately operable to permit and restrain traffic upon intersecting streets. When the intersection is to be cleared, all four red lights will be momentarily displayed, one pair of red signals being extinguished upon the illumination of a transversely disposed green signal. A device constructed as above outlined would positively halt all traffic for a period at the intersection of two streets, is cheaper to manufacture and far more effective to accomplish the desired end, and in addition will eliminate motorists starting to move upon the illumination of the change signal as they have been observed to do under the present system."

I concur in the foregoing opinion and the conclusion which Mr. Wermich reaches that the patent in this case can

be disregarded—claims 1, 2, 3, 4, 5 and 8 being not infringed, and claims 6, 7, 9 and 10 being invalid.

It might be well to observe in this connection that neither this nor any other opinion constitutes insurance against possible litigation, and if the practice is not now being followed provisions should be included in every contract made by the City for the purchase or lease of mechanical devices that the seller or lessor agrees to indemnify and save the City harmless from any loss or damage that may be incurred as the result of claimed infringements of patents.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Exhibition of Motion Picture During Pendency of
City's Appeal from Judgment for Mandamus.**

June 8, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have forwarded to this office a communication from the attorneys for the First National Pictures, Inc., requesting a permit to show a photoplay entitled "Chickie" and protesting against any interference on behalf of the City with the exhibition of said photoplay. The Censor Board refused an unlimited permit to exhibit the said motion picture, although a permit limited to adults only was offered. A mandamus proceeding was subsequently brought by the First National Pictures, Inc., against the City of Chicago in order to obtain an unlimited permit. The jury returned a verdict in favor of the petitioner and the City appealed to the Appellate

Court of Illinois. The attorney for the petitioner admits that the appeal stays the issuance of the writ of mandamus, and no writ of mandamus has been served upon the City. But the attorney for the petitioner takes the position that the petitioner is entitled to exhibit the picture pending the appeal. With this contention, we are not in accord, because the petitioner has no permit to exhibit the motion picture, and the judgment in the mandamus action cannot operate to restore the permit until a permit is actually received after the writ of mandamus has been served. Since the appeal stays the issuance of the writ, the petitioner has no right to obtain a permit, and it is unlawful to show the picture without a permit.

Any damages which may be suffered by the owners of the motion picture due to the delay which results from the appeal to the Appellate Court and the refusal of your department to grant a permit to show the said picture pending the appeal, are not recoverable at law. This was decided in the case of *Vitagraph Co. of America v. City of Chicago*, 209 Ill. App. 591. In that case, the complainant attempted to obtain an injunction for the purpose of showing the motion picture in question pending the appeal in the mandamus proceedings to the Appellate Court. The court said:

“The right to such relief is based upon the claim of irreparable injury. The substance of the claim is that unless appellee is given an immediate right to such exhibition following the publicity given to the spoken play and the advertising of said photoplay, the opportune time for its exhibition will pass, resulting in a loss of large anticipated profits and the benefit of expenses already incurred. From the averments of the sworn bill this may perhaps be conceded, and as no bond could be required of the city or its officers on such appeal, losses so sustained would be irrecoverable.

But as said in *Rees v. City of Watertown*, 19 Wall. (U. S.) 107, 124, discussing mandamus: ‘The remedy is in law and in theory adequate and perfect. The difficulty is in its execution only. The want of a remedy and the inability to obtain the fruits of a remedy are quite distinct.’ The remedy of mandamus was held adequate

in two cases somewhat similar to this, *Klinesmith v. Harrison*, 18 Ill. App. 467, upon a bill to restrain the mayor and police officers from attempting to enforce against the complainant certain ordinances prohibiting him from carrying on the business of an auctioneer without a license, and *City of Chicago v. O'Hare*, 124 Ill. App. 290, where the lower court had restrained the city's officers from interfering with the keeping of a dramshop for which a license had been refused. The court in the latter case said, citing various authorities, that if the complainant had brought himself within the provisions of the ordinance so that the right to a license was not doubtful and appellant had still refused him a license, the remedy by mandamus was open to him.

Complainant here resorted to such remedy and obtained the writ. The city or its proper officer, exercising an unquestioned right, appealed. It is conceded such appeal operated as a *supersedeas*. Manifestly, to avoid its consequence, this proceeding was instituted for the injunctive relief given which operates to nullify the effect of the *supersedeas* and to prevent an enforcement of the city's ordinances against appellee.

Should the city be upheld in refusing the permit the result of the injunction would be to permit an unlawful conduct of the business in the meantime. We think the fundamental error in the theory of the bill is that the refusal of the license or permit deprived complainant of a personal or property right. The business is conceded to be one subject to police regulation. In such case 'the refusal to license deprives no man of any personal or property right, but merely deprives him of a privilege which it is within the discretion of the municipal authorities to grant or withhold.' (*People v. Cregier*, 138 Ill. 401, 419.) Whether the discretion in that regard was abused was apparently the question in the mandamus proceeding. The delay incident to its final adjudication does not, however, disturb any property or personal right of appellee. The case does not come within that class referred to in appellee's brief where an injunction will issue to preserve existing conditions as to property rights theretofore asserted or enjoyed, during the pendency of litigation with respect thereto. This is not a proceeding to prevent the city or its officers from taking any affirmative or unauthorized or wrongful action to deprive appellee of a right it had previously asserted or enjoyed. On the contrary,

it is one having the effect of conferring upon appellee the exercise of a privilege to which it is not entitled without an official permit. Whether the permit is wrongfully withheld is the subject of a pending proceeding at law entirely adequate to determine appellee's right thereto. We do not think the bill presents a case for equitable relief."

Relative to the provisions of the law for the unlawful exhibition of a motion picture film without a permit, we desire to advise you as follows:

Section 2785 of The Chicago Municipal Code of 1922 makes it unlawful to exhibit a motion picture film unless a permit has been obtained for the same, and a penalty is provided therefor. Under this section, arrests may be made, but no arrests should be made except under warrants. When making arrests under warrants, the complaints should be sworn to by intelligent witnesses who have actually seen the offense committed, and the time and place of the offense, as viewed by the witnesses, should be designated in the warrants. Any person engaged or aiding in the unlawful exhibition of the film may be arrested by warrant under this section of the code. The warrants should designate the offender by name, or, if the name is not known to the person swearing to the complaint, then the complaint and warrant may designate the person by any description or circumstances by which he can be identified with reasonable certainty.

Section 2790 of The Chicago Municipal Code of 1922 provides for the confiscation of any motion picture film when the same is exhibited without a permit. Should you decide to follow this course of procedure, a search warrant should be obtained and the film seized under the warrant.

A further remedy afforded by the code is the revocation of the license of the Chicago Theatre. Section 2411 of the code provides that "if at any time after the granting of any license, any department head shall certify to the Mayor that the licensee is violating any of the ordinances of the City of Chicago or any of the statutes of the State of Illinois in the

conduct of his business, the Mayor shall have the power to revoke the license therefor.”

Very truly yours,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Solicitation of Property Owners to File Objections to Special Assessments.

June 9, 1925.

HON. DONALD B. McKINLAY, Alderman 19th Ward.

Dear Sir:

You have transmitted to this office a copy of a resolution of the City Council which was introduced by you at a recent meeting of said body, and you request an opinion relative to the legality of the proposed legislation and, if legal, the drafting of a bill providing for such legislation. The above mentioned resolution provides as follows:

Whereas, public improvements of great value to the people of Chicago have been delayed and at times abandoned, owing to the large number of objections filed in the County Court by property owners affected; and

Whereas, there are certain individuals and associations who are in the business of soliciting such objections and are active in encouraging the filing of such objections; and

Whereas, a committee of the Chicago Bar Association is now investigating the activities of such persons and associations, and the ethical status of attorneys connected with same, where the business is solicited; and

Whereas, a great many property owners accept such service and file such objections, not because of any con-

viction that the City has been unfair or illegal in the assessment, but because of the fact that the fee or commission to be paid for such services is on a contingent or percentage basis; and

Whereas, many times, through such objections, other property owners are compelled to bear an unfair burden on account of supplemental assessments or are put to great inconvenience, through the abandonment of the improvement;

Therefore, Be It Resolved, that the Corporation Counsel prepare a bill to be introduced at the next session of the Legislature, which shall prohibit all soliciting of objections to public improvements and also prohibit the contracting for or rendering of, any services by attorneys, associations or other persons in connection with or representing objections to public improvements when such services are to be paid for on any so-called contingent or percentage basis."

The subject-matter of the proposed legislation is covered in practically every phase by the existing sections of the Criminal Code relative to barratry and maintenance. Section 43 of the Criminal Code (Cahill's Revised Statutes for 1923) provides as follows:

"If any person shall wickedly and willfully excite and stir up any suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of common barratry, and shall be fined not exceeding one hundred dollars; and if he be an attorney or counsellor at law, he shall be suspended from the practice of his profession, for any time not exceeding six months."

Section 44 of said Criminal Code relative to maintenance provides as follows:

"If any person should officiously intermeddle in any suit at common law or in chancery, that in nowise belongs to or concerns such person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend such suit, with a view to promote litigation, he shall be deemed guilty of maintenance, and upon conviction thereof, shall be fined and punished as in cases of common barratry; provided, that it shall not be considered maintenance for a man to maintain the suit of

his kinsman or servant or any poor person out of charity.”

The practice commonly followed by attorneys representing objectors in special assessment proceedings is to employ “runners” who obtain the names of all persons in the assessment district as shown on the assessment roll and who go from house to house soliciting such persons and requesting them that they allow the attorney whom they represent to take their case and file objections for them in their names. The inducement held out usually is that the attorney will pay all costs of the proceeding, and that if the attorney is unsuccessful in obtaining a reduction in the assessment there will be no cost of any kind to be borne by the objector. On the other hand, if the attorney is successful, he is to be paid a certain percentage of the amount of the reduction which he secures. Such percentage is usually placed at one-third.

In our opinion the soliciting of business by attorneys in the manner aforesaid violates the above quoted section of the Criminal Code relative to barratry. The fact that the statute on barratry refers to suits or quarrels between the *people* of the state, is not affected by the fact that the City is one of the parties, because Paragraph 5 of Section 1 of the statute relative to statutes provides that “the word ‘person’ or ‘persons’ as well as all words referring to or importing persons, may extend and be applied to bodies politic and corporate as well as individuals.” The action of the attorney in soliciting this business is a willful stirring up of a suit and, in our opinion, a wicked stirring up of a suit, because the same is an obstacle to public improvement and has been solicited by the attorney for his own selfish ends.

The law is well settled that whenever an attorney takes a case upon a contingent fee, agreeing to pay the costs of the litigation and, if he is unsuccessful, to bear all the expenses of the litigation, such an arrangement is champertous. In the case of *Brush v. City of Carbondale*, 229 Ill. 144, the Supreme Court, at page 152, said :

“They clearly state the rule that there are two essential elements in every champertous agreement; first, there must be an undertaking by one party to defray the expenses, in whole or in part, of another suit; second, an agreement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event the prosecution was successful.”

We are of the opinion that the soliciting of business by attorneys offering to pay the costs of the proceeding is champertous and in violation of the law.

It will be observed that every feature of the proposed legislation is covered by the criminal law except a provision prohibiting the contracting for or rendering of any services by attorneys when such services are to be paid for on any contingent or percentage basis. It is very doubtful that such a law could be sustained. The Supreme Court has held that the taking of a case by an attorney upon a contingent fee is not unlawful, so long as the attorney does not pay the costs and expenses of the proceeding. Any law which attempted to prevent an attorney from entering into such a contract, might well be construed as an interference with freedom of contract and be held invalid.

In view of the foregoing we are of the opinion that the criminal law sufficiently covers this question at the present time. We advise you that when attorneys pursue the conduct above outlined, they may be proceeded against for violations of the Criminal Code, and, further, under the section of the statute relative to barratry, disbarment proceedings may be instituted.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Inspection of Tenement House Containing Store on First Floor or Basement.

June 9, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of June 1st requesting the views of this department concerning the proper interpretation of Section 445 of The Chicago Municipal Code of 1922. Said Section 445 provides as follows:

*“445. Annual inspection of buildings—stairways and means of egress—inspection fee.) (a) The commissioner of buildings and his assistants shall make an annual inspection of all theaters and places of amusement, worship, instruction or entertainment, and also of all other buildings over two stories in height, except residences, and except buildings in which automobiles are housed, and except tenements three stories or less in height. . * * *”*

Tenements three stories or less in height are exempted from the provisions of the above section, and you wish to be particularly advised whether a tenement house three stories or less in height, which has a store located either in the basement or on the first floor, should be exempted.

Buildings which are not over two stories in height, unless they are theaters, places of amusement, worship, instruction or entertainment, are not subject to the annual inspection.

The plain purpose of the above section requiring an annual inspection of certain buildings is to ascertain whether such buildings comply in all respects with the ordinances of the City of Chicago as to construction, etc.

Where a store is located in the basement or on the first floor of a tenement house, such a store would undoubtedly add

materially to the fire hazard, and the building would cease to be exclusively a tenement house within the meaning of the above set out provision of the Building Ordinance.

It therefore would appear highly important and desirable and in consonance with the intent and purpose of the law, that tenement houses which are more than two stories in height and which contain stores should be inspected annually. This should be done because of the said increased fire hazard, that it may be made certain by the annual inspection that the said tenement houses in which the stores are contained conform in all respects to the ordinances of the City of Chicago.

I agree in your construction of the ordinance that a tenement house over two stories in height which contains a store should not be exempt from the payment of the fee fixed by law for such inspection. Of course, a different rule would apply in regard to tenement houses three stories or less in height which are used entirely for tenement house purposes.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Prosecution of Pickpockets and Other Known Criminals When Found Loitering About Places Frequented by Crowds.

June 10, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You have forwarded to this office a communication from the commanding officer of the first district regarding activi-

ties of pickpockets in the loop. By said communication we are informed that a large number of pickpockets are operating in the loop district and that their trade has become so systematized that persons arrested for this offense are frequently released upon habeas corpus writs prepared in advance.

The section of The Chicago Municipal Code of 1922 relative to pickpockets is as follows:

“2655. DISORDERLY CONDUCT—PENALTY.) All persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city; all persons who shall collect in bodies or crowds for unlawful purposes, or for any purpose, to the annoyance or disturbance of other persons; all persons who are idle or dissolute and go about begging; all persons who use or exercise any juggling or other unlawful games or plays; all persons who are found in houses of ill-fame or gaming houses; all persons lodging in or found at any time in outhouses, sheds, barns, stables or unoccupied buildings, or underneath sidewalks, or lodging in the open air and not giving a good account of themselves; all persons who shall wilfully assault another in said city, or be engaged in or aid or abet in any fight, quarrel or other disturbance in said city; all persons who stand, loiter or stroll about in any place in said city waiting or seeking to obtain money or other valuable thing from others by trick or fraud or to aid or assist therein; all persons that shall engage in any fraudulent scheme, device or trick to obtain money or other valuable thing in any place in said city, or who shall aid or abet or in any manner be concerned therein; all touts, ropers, steerers or cappers, so called, for any gambling room or house who shall ply or attempt to ply their calling on any public street in said city; all persons found loitering about in any hotel, block, barroom, dramshop, gambling house or disorderly house, or wandering about the streets either by night or day without any known lawful means of support, or without being able to give a satisfactory account of themselves; all persons who shall have or carry any pistol, knife, dirk, knuckles, slungshot or other dangerous weapon concealed on or about their persons; and all persons who are known to be thieves, burglars, pickpockets,

robbers or confidence men, either by their own confession or otherwise, or by having been convicted of larceny, burglary or other crime against the laws of the state of Illinois, who are found lounging in or prowling or loitering around any steamboat landing, railroad depot, banking institution, place of public amusement, auction room, hotel, store, shop, thoroughfare, car, omnibus, public conveyance, public gathering, public assembly, court room, public building, private dwelling house, out-house, house of ill-fame, gambling house or any public place, and who are unable to give a reasonable excuse for being so found; shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally subject to a fine of not less than one dollar nor more than two hundred dollars for each offense."

The section of the Criminal Code of Illinois commonly known as the Vagrancy Law, is similar to the above quoted portion of the code, and is as follows:

"606. DEFINITION.) Sec. 270. All persons who are idle and dissolute, and who go about begging; all persons who use any juggling or other unlawful games or plays; runaways; pilferers; confidence men; common drunkards; common nightwalkers; lewd, wanton and lascivious persons, in speech or behavior; common railers and brawlers; persons who are habitually neglectful of their employment or their calling, and do not lawfully provide for themselves, or for the support of their families; and all persons who are idle or dissolute and who neglect all lawful business, and who habitually mis-spend their time by frequenting houses of ill-fame, gaming houses or tippling shops; all persons lodging in, or found in the night-time in out-houses, sheds, barns or unoccupied buildings or lodging in the open air, and not giving a good account of themselves; and all persons who are known to be thieves, burglars or pickpockets, either by their own confession or otherwise, or by having been convicted of larceny, burglary or other crime against the laws of the State, punishable by imprisonment in the State prison, or in a house of correction of any city, and having no lawful means of support, are habitually found prowling around any steamboat landing, railroad depot, banking institution, broker's office, place of public amusement, auction room, store, shop or crowded thoroughfare, car or omnibus, or at any public gathering or assembly,

or lounging about any court-room, private dwelling houses or out-houses, or are found in any house of ill-fame, gambling house, or tippling shop, shall be deemed to be and they are declared to be vagabonds."

Under the above quoted ordinance and statute, all persons who are known to be thieves, burglars or pickpockets, either by their own confession, or otherwise, or by having been convicted of larceny, burglary, or other crime against the laws of the State of Illinois, who are found lounging, prowling or loitering around any steamboat landing, railroad depot, banking institution, place of public amusement, auction room, hotel, store, shop, thoroughfare, car, omnibus, public conveyance, public gathering, public assembly, court room, public building, private dwelling house, out-house, house of ill-fame, gambling house or any public place, and who are unable to give a reasonable excuse for being so found, may be arrested. The person arrested may be shown to be a pickpocket either by his own confession or otherwise, or by a certified copy of a conviction of larceny, burglary or other crime by a court. If it can be shown that the person arrested is known to be a pickpocket, either by confession or by certified copy of an order of conviction, and if the person arrested is found loitering in any of the public places mentioned in the ordinance or statute without being able to give a reasonable excuse for his presence, he may be arrested. (*People of the State of Illinois v. William O'Keefe*, 178 Ill. App. 86).

If a pickpocket is discovered in the act of picking a pocket, he should be arrested and booked for the crime of larceny. We trust that this is the information which you desire.

Very truly yours,

ALBERT H. VEEDER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Necessity of Frontage Consents for Hospital at 669 Irving Park Boulevard.

June 13, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your communication of June 4th with enclosure from Mr. S. L. Golan, in regard to the Sheridan Rest Home, 669 Irving Park boulevard.

You state in your letter as follows:

“The above named institution is a hospital located at the corner of Pine Grove avenue and Irving Park boulevard. The building fronts on Irving Park boulevard and extends on Pine Grove avenue.”

You wish to be advised what frontage consents, if any, are required before a license can lawfully be issued for the operation of the said hospital.

The sections of the Municipal Code relating to the conduct of hospitals by private parties are as follows:

“479. FRONTAGE CONSENTS FOR HOSPITALS.) It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage any hospital in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may front are devoted to exclusive residence purposes, unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building fronts and faces consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in said block. Such written consents of the majority of said property owners shall be filed with the Commissioner of Health before a permit shall be granted for the building or constructing, or a license be issued for the maintaining, conducting or managing of any such hospital.”

“930. HOSPITAL OR HOME FRONTAGE CONSENTS.) It shall be unlawful for any person, firm, association or corporation to build, construct, maintain, conduct or manage a hospital, or a home, as defined in chapter XXXIX of this ordinance, in any block in which two-thirds of the buildings fronting on both sides of the street or streets on or along which the proposed hospital or home may face are devoted exclusively to residence purposes, unless the owners of a majority of the frontage in such block and the owners of a majority of the frontage on the opposite side or sides of the street or streets on or along which said building faces consent in writing to the building, construction or maintaining, managing or conducting of any such hospital or home in such block; provided, however, that no new frontage consents shall be required if such hospital or home has heretofore been licensed by the City of Chicago as a hospital, home or nursery at the present location. Such written consents of the majority of said property owners shall be filed with the Commissioner of Health before a permit shall be granted for the building or construction of any such hospital or home and before a license shall be issued for the maintaining, conducting or managing of any such hospital or home.”

“1862. FRONTAGE CONSENTS REQUIRED—WHEN.) It shall be unlawful for any person, firm or corporation to build, construct, maintain, conduct or manage, in any block in which two-thirds of the buildings fronting on both sides of the street or streets on which the proposed hospital may face or extend are devoted exclusively to residence purposes, any hospital, unless the owners of a majority of the frontage in such block, and the owners of a majority of the frontage on the opposite side or sides of the street or streets on which said building faces or extends, consent in writing to the building, constructing or maintaining, managing or conducting of any such hospital in such block. Such written consents of the majority of said property owners shall be filed with the commissioner of health before a permit shall be granted for building or constructing any such hospital and before a license shall be issued for the maintaining, conducting or managing of such hospital.”

There is no material difference in the above three sections of the code in their application to what shall be taken into consideration in computing whether two-thirds of the

buildings are devoted exclusively to residence purposes where the proposed hospital is to be located on a corner, as in the instant case.

Section 479 uses the words "street or *streets* on which the proposed hospital may front," signifying that the building may front on two streets. Section 930 uses the words, "street or *streets* on or along which the proposed hospital or home may face," signifying that the building may face on two streets. Section 1862 uses the words "street or *streets* on which the proposed hospital may face or extend," signifying that the proposed hospital may face on one street and extend to or along another street. They all indicate that in cases in which hospitals are to be located on corners, or where such hospitals might front, face, or face or extend, on two or more streets, that each of the said streets should be regarded in the determination of the question as to whether two-thirds of the buildings are devoted exclusively to residence purposes.

The purpose of frontage consent ordinances is to protect residence streets; to keep off of such streets what might be regarded as objectionable structures, unless the "lot owners waive the right to insist upon a legal prohibition adopted for their benefit and comfort." (*City of Chicago v. Stratton*, 162 Ill. 494.)

In the case of a hospital situated on the corner of two streets under the above provisions of the Municipal Code, both streets are to be taken into consideration.

The building in which it is proposed to locate this hospital faces on Irving Park boulevard. Therefore, if two-thirds of the buildings in the Irving Park boulevard block, fronting on both sides of the street, are devoted exclusively to residence purposes, frontage consents are required in the said Irving Park boulevard block.

The proposed hospital building, you state, extends on Pine Grove avenue. Therefore, if two-thirds of the buildings on both sides of Pine Grove avenue between Irving Park boulevard and Sheridan road (which is the next street to the

south), are devoted exclusively to residence purposes, then frontage consents are necessary on Pine Grove avenue between Irving Park boulevard and Sheridan road.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Permits for Construction of Third Track on Elevated Railroad Structure.

June 15, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter concerning the permits recently issued for the construction of a third track on the elevated railroad structure in West Lake street from North Crawford avenue (formerly North 40th avenue) to North Laramie avenue (formerly North 52d avenue) and from North Ashland avenue to North Rockwell street. There is now, we understand, a third track on said elevated railroad from North Rockwell street to North Crawford avenue. Said existing track is approximately one and three-quarters (1 3-4) miles in length; the proposed new track is to be approximately two and three-quarters (2 3-4) miles in length; therefore said third track when extended will make available a track for express service approximately four and one-half (4 1-2) miles long.

Section 7 of the Through-Routing Ordinance passed by the City Council on July 28, 1913, and accepted in writing by

the Northwestern Elevated Railroad Company, the South Side Elevated Railroad Company, the Metropolitan West Side Elevated Railway Company and the Chicago and Oak Park Elevated Railroad Company on September 4, 1913, provides as follows concerning said proposed third track:

“The Oak Park Company (Chicago and Oak Park Elevated Railroad Company) is hereby authorized to construct, maintain and operate a third track upon all or any portion of its elevated railroad structure located between 40th avenue and North 52d avenue, and upon all or any portion of its elevated railroad structure located between Rockwell street and North Ashland avenue.”

The purpose of the Council in the passage of said Through-Routing Ordinance, was to enable the properties of said four elevated railroad companies to be operated as a single system, providing through-route service from the north limits of the City to the most southerly point reached by the elevated railroad system, and providing for free transfers from any one of the elevated railroad lines to any other line, either on the Union Loop or at any place outside of said Union Loop where two elevated railroad lines should intersect. Prior to the passage of said ordinance, said elevated railroads had been operated as four separate systems, although trains on all said railroad lines were operated around the Union Loop. The public had long desired the creation of said through-route service, and the establishment of free transfers from one elevated railroad line to another. At the same time it was desirable that the elevated railroad system when operated as a single system to the extent provided by said ordinance should provide for a certain amount of express service on each of its various branches and for the operation of longer trains than had heretofore been operated.

Section 1 of said ordinance, therefore, authorized extensions of the platforms at certain of the stations of said companies on the Union Loop in order to provide for such longer trains and for transferring of passengers. Section 2 provided for the building of overhead transfer bridges at certain

of the stations on said Union Loop to facilitate the convenience of passengers desiring to change from one branch of said elevated railroad to another; Section 3 provided for such changes in alignment of tracks at connections between said railroad lines and the Union Loop that might be necessary and convenient to permit the cars and trains of the Northwestern Elevated Railroad Company to pass over said Union Loop onto the tracks of the South Side Elevated Railroad Company and to permit the cars and trains of said "South Side Company" to pass over the Union Loop onto the tracks of said "Northwestern Company"; Section 4 granted a general authority for the lengthening of platforms at any or all stations on the elevated railroad system outside of said Union Loop, provided the total of each of said platforms should not be more than three hundred thirty (330) feet; Sections 5 and 6 authorized the Metropolitan West Side Elevated Railway Company, and the Chicago and Oak Park Elevated Railroad Company to make provision for connecting their respective lines and for transferring passengers between said lines at a point west of said Union Loop; the provisions of Section 7 have been quoted above. Some part of the work to be done under the ordinance was of necessity to be performed before trains and cars could be through-routed as therein provided and before any practicable system of transfers could be installed. Concerning the time within which such work should be completed, Section 8 of said ordinance provides in part as follows:

"The work authorized by Sections 1, 2 and 3 of this ordinance shall be done and completed by said companies within six (6) months after the date of the acceptance hereof, except that the stairways so authorized need not be completed until twelve (12) months after such date. The work authorized by Section 5 of this ordinance shall be done and completed within nine months after the date of the acceptance hereof * * *"

With respect to other portions of said work, including the third track provided for by Section 7; and for which permits

have recently been issued, Section 9 of said ordinance reads as follows:

“It is understood that the authority for the work mentioned in Sections 4, 6 and 7 of this ordinance is merely permissive, and that the omission to do any such work shall not be deemed a violation of this ordinance by any of said four companies.”

The through-route service and free transfer system provided for by said ordinance became effective on February 2, 1913, and have since been continuously in operation. Subject to the approval of the Commissioner of Public Works, whose approval of all construction plans is required by Section 10 of said ordinance, the companies have at various times since that date lengthened platforms outside the Union Loop, provided additional stairways, altered transfer bridges and in other ways used, in the construction and alteration of their elevated railroad facilities, the authority conferred by said Through-Routing Ordinance.

In view, therefore, of the purposes manifested by the said Through-Routing Ordinance as a whole, and of the service that has been carried on since the passage of said ordinance, we are of the opinion that the permission granted by said Section 7, taken in conjunction with the provisions of Sections 8 and 9, indicates an intention to confer a continuing authority for the construction of said third track or express track as the same may be found desirable at any time during the term fixed by the original ordinances providing for the building of the Lake street elevated railroad. It is expressly provided in Section 11 of said ordinance that

“nothing in this ordinance contained shall operate so as to extend the term or life of any grant or privileges heretofore acquired from the City of Chicago by said companies, or either of them, nor shall the privileges herein granted extend beyond the limits of such former grants.”

We are therefore of the opinion that the permits recently issued for the construction of said third track were a proper

exercise of powers conferred upon the Commissioner of Public Works by said ordinance.

Yours very truly,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Contract With Tenant for Repairing and Painting Building Leased by City.

June 17, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your communication of May 29, 1925, stating that the City of Chicago is the owner of the frame building at 1315 East 55th street, formerly used as a fire station, but now leased to Mr. J. D. Armstrong for a carpenter's shop; that Mr. Armstrong has submitted estimates for making repairs and painting the building at a total cost of \$600, to be paid by crediting on the rent.

You wish to be advised if the Comptroller has the authority to make such an agreement without having the approval of the City Council. The ordinance controlling contracts is very specific in this respect. We find in The Chicago Municipal Code of 1922, Chapter IV, Section 50, the following:

“CONTRACTS EXCEEDING FIVE HUNDRED DOLLARS—BY WHOM LET.) All contracts for work, material, or supplies of any kind or nature, let by any officer of the city, where the amount of such contract exceeds five hundred dollars, shall be let to the lowest responsible bidder, after adver-

tising the same. All such contracts before becoming of any effect shall be approved and countersigned by the comptroller.

Advertisement shall be made and bids submitted and received by the proper officer in the same manner as is provided for the letting of contracts in and by the provisions of this ordinance concerning the letting of contracts of the department of public works."

You will see from the above section of the code that the Comptroller cannot enter into a contract amounting to more than \$500 without the approval of the City Council, unless he advertises and lets it to the lowest responsible bidder in due form.

Very truly yours,

FRANK T. HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of City to Compel Railroad Companies to Light Subways Under Their Tracks.

June 19, 1925.

HON. GEORGE M. MAYPOLE, Chairman, Committee on Track
Elevation.

Dear Sir:

We are in receipt of your communication in which you ask the Corporation Counsel to render an opinion to your committee "as to the right of the City to compel railroad companies to light subways under their tracks where the tracks are elevated under ordinances in which there are no provisions requiring them to light the subways." We assume that said subways have been constructed, in each case, in

substantial compliance with the track elevation ordinances providing therefor and that said subways were, upon completion of the same, accepted by the Commissioner of Public Works under the terms of said ordinances. We are of the opinion that the City has no power to compel said railroad companies to assume such additional burden and that the City must provide for the lighting of subways except where such duty is imposed upon the respective companies by contract ordinances.

No express grant has been given to the State which authorizes the City to require railroad companies to maintain such lights. If the City can impose such a duty upon the railroads it is only because of the police power possessed by it and the recognized duty of such railroads to protect the safety of the public at railroad crossings. As stated by the Supreme Court of the United States in *Great Northern Railway Company v. Clara City*, 246 U. S. 435 (pp. 436-437) :

“It is too well settled by former decisions of this court to require extended discussion here that railroad companies may be required by the States in the exercise of the police power to make streets and highways crossed by the tracks of such companies reasonably safe and convenient for public use, and this at their own expense. Such companies accept their franchises from the State subject to their duties to conform to regulations, not of an arbitrary nature, as to the opening and use of the public streets for the purpose of promoting the public safety and convenience.”

Sections 3410 and 3411 of The Chicago Municipal Code of 1922 now read as follows in respect to the duty of railroad companies, at their own expense, to light the crossings where their respective roads intersect the streets of the city and in respect to the assessment of penalties for failure to perform such duty :

“3410. LIGHTS AT CROSSINGS.) Every person or corporation owning or operating any steam, elevated or street railway, whose track or tracks cross or intersect at, above or below the grade of any of the streets within the city, shall, and he or it is hereby required to, provide

at his or its own expense, proper, and sufficient lights, and care for the same at all such crossings or intersections. Such lights shall be of such kind as may be approved by the commissioner of public works.

“3411. PENALTY.) Any such person or corporation failing to comply with the provisions of the preceding section shall be fined not less than ten dollars nor more than one hundred dollars for each offense, and each day during which any crossing or intersection situated as aforesaid shall be permitted to remain without such lights after the first conviction shall constitute a separate and distinct offense.”

The language of these sections of the present code is identical with that contained in Sections 2202 and 2203 of the Code of 1911 and Sections 1997 and 1998 of the Code of 1905. In *City of Chicago v. The Pennsylvania Company*, 252 Ill. 185, the Supreme Court held that said Section 1997 of the Code of 1905 was invalid so far as it applied to railroads crossing above the grades of streets on elevated structures. In that case, the City of Chicago had brought suit against the Pennsylvania Company to recover the penalty provided for in said Section 1998 for failure to maintain lights as provided by said Section 1997 in the subway over which the railroad lines of said company cross 22d street.

There was no dispute in regard to the facts. For many years prior to 1900 the railroad company or its predecessors had operated, by authority of various ordinances of the City of Chicago, a steam railroad on the surface of Stewart avenue, which runs north and south across said 22d street. In 1900, the City Council passed an ordinance requiring the railroad company to elevate its tracks from 21st street southwardly to 53d street. Said ordinance provided for subways in certain streets, among which was 22d street, but contained no provisions obligating the company to provide or maintain lights in such subways. The court found that the evidence showed that as a result of the overhead crossing, the street beneath was somewhat darkened in the daytime, and was rendered darker at night than it otherwise would have been; that lights were required in the subway to protect the public from the

danger of collision and from the danger of coming in contact with iron posts erected in the roadway to support the superstructure of the railroad.

Nevertheless, in reversing the decision of the Municipal Court, which had rendered judgment in favor of the City, the court said (pp. 192-193) :

“By elevating its roadbed and separating its grade from the grade of the street, all danger of collision between trains of the plaintiff in error and persons or property was entirely eliminated. In passing along the street in the subway beneath the tracks of plaintiff in error, no danger is encountered by reason of the operation of the trains of plaintiff in error. Under the exercise of the police power, the only excuse which could be given to support the right of the city to require plaintiff in error to maintain lights in the subway would be that the same were necessary for the protection of the public on account of the operation of the railroad through the running of its trains. That the public is no longer in danger because of the operation of the trains of plaintiff in error is conceded. It is only contended that defendant in error has the right to require plaintiff in error to maintain lights at this subway because of the building of the structure required by the elevation ordinance has darkened the street. Plaintiff in error has the right to maintain its tracks across Twenty-Second street by reason of the license given it by defendant in error to do so. Under the elevation ordinance it had a right to erect the structure it has erected across Twenty-Second street. The city has no more right to require plaintiff in error to maintain lights in this subway merely for the reason that its structure has tended to darken the street, than it has to require the owners of buildings along the line of any street to keep the street lighted because the buildings, on account of their height, has tended to darken the street and make it less safe for travel. To require plaintiff in error to maintain such lights would be to deny it the equal protection of the laws.”

While this is the only case in this State directly upon the question asked in your letter, said decision was cited with approval in *The Sanitary District of Chicago v. Chicago and Alton Railroad Company*, 267 Ill. 252, and *East Side Levee*

and Sanitary District v. The East St. Louis and Carondelet Railway, 279 Ill. 123, and the reasoning of the court is the same as that adopted in *People v. Illinois Central Railroad Company*, 235 Ill. 374, in which case the court held that the City could not, under its police power, compel a railroad company, in the absence of contractual obligations in the company's contract ordinances, to repave the floor of a subway which had become worn and broken and dangerous to public travel.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Status of Cohan's Grand Opera House As an Existing Building.

June 23, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

You have enclosed a letter from Mr. Harry J. Ridings, manager of George M. Cohan's Grand Opera House, Chicago, stating that a permit is desired to reconstruct the said theater. The question which arises is whether the permit should be issued for an existing building, or a building to be "hereafter erected."

The communication of Mr. Ridings does not go into detail with respect to the remodeling of the theater, except to say that the proposed plan contemplates the removal of the present wood stairs and wood roof and top gallery, making all the new work fireproof; the number of seats are to be reduced

from 1,400 to 1,200; the present tunnel is to be enlarged and all existing obstructions at the front of the auditorium lobby are to be removed.

The Building Ordinance classifies public theaters as buildings of Class V and further divides Class V into two divisions, namely, buildings in existence at the time of the passage of the ordinance (the time of passage of the ordinance being July 18, 1905), and buildings of Class V hereafter erected. The provisions of the Building Code for each of these divisions are different. Therefore it is necessary to determine whether the remodeling of the theater constitutes the erection of a new building, or is merely a remodeling of a building already in existence.

You have enclosed a copy of an opinion rendered to the Building Commissioner by the Corporation Counsel on May 9, 1922, holding that the remodeling of McVickers' Theatre is not the erection of a new building. In searching through the past opinions of the Corporation Counsel, we have also discovered a similar opinion rendered by the Corporation Counsel to the Building Commissioner on April 13, 1905, which holds that the remodeling of the LaSalle Theatre does not constitute the erection of a new building. A copy of said opinion is enclosed herewith. Of course, in every case, it is a question of fact which, in the last analysis, must be determined by you, as to whether the work done constitutes the erection of a new building or the remodeling of an old building. Although the facts are not completely set forth in the instant case, we take it that the walls of the theater are not to be torn down, and that the work to be done merely contemplates the removal of the stairs, roof, top gallery and seats. Apparently, this remodeling of the Grand Opera House is not the erection of a new building, but should be properly classified as the renovation or remodeling of an existing building. However, that is a matter which must be decided by you after an investigation of the plans. If you find that the work to be done does not involve the erection of a new building, then you should issue a permit for a Class V building already in existence. If, however, you find that the work does involve the

erection of a new building, then you should issue a permit for a building of Class V hereafter erected and should require the new building to comply with the requirements of the latter classification.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Validity of Proposed Act Fixing Process for Placing
Person Afflicted With Contagious Disease in
Hospital.**

June 24, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

You sent this office a copy of Senate Bill No. 304 as originally introduced in the Senate, also nine amendments which were made by the House of Representatives, and you inquired whether the said bill as passed would be a constitutional act if signed by the Governor.

Owing to the fact that there were amendments in the Senate before the bill reached the House, and we were unable to attach the House amendments in any intelligible way to the original Senate bill, it was necessary for us to secure the Senate bill in the House before we could give you any answer to your question. For your guidance, we have rewritten the bill as finally passed, and we forward a copy of same herewith.

The proposed act contemplates that before a person can be confined in a hospital on account of being afflicted with a contagious disease, certain processes of law must be gone through with. There must be a complaint filed by a public health officer before a court of competent jurisdiction, the court must pass upon the sufficiency of same, and then issue a warrant under which a medical examination will be had. Such warrant must be served by an officer authorized to serve process in civil suits by delivering a copy thereof to the patient and informing him of its contents. The health officer who is to make the examination must be named in the warrant, and apparently he is supposed to accompany the server of the writ, and must conduct his medical examination at the time of the service of the warrant. Then the officer who served the warrant must make a return thereon to the court, which return must be accompanied by the report of the health officer who made the examination, and then upon a hearing, if the court is satisfied from the evidence and the report that the diseased person is a public nuisance and will or may endanger the public health, he may enter an order authorizing such person to be confined in a hospital or an institution for treatment. There are severe penalties attached to the violation of the act, and the person who abets, aids or directs conduct constituting a violation is equally liable. In addition to these penalties, the person aggrieved may sue and recover in an action of debt the sum of \$2,000.

Under our form of state government the legislature is supreme, except in so far as it is restricted or limited by the constitution. If we are to hold any law passed by it unconstitutional or invalid we would have to find some inhibitory language in the constitution on which to base such an opinion. Otherwise, no matter how drastic or how absurd a measure may be, it will become the law of the state if the bill is signed by the Governor.

Applying the rule above stated to the bill in question, there does not appear to be any provision of the constitution which prevents the legislature from enacting such a law. We can conceive of many occasions and emergencies where it

would be excusable to ignore the law or to violate it, but these occasions can arise only where either society or the individual finds it necessary to act in order to preserve itself. To illustrate: The civil officer charged with the duty of serving the warrant might refuse to execute the warrant, because he feared the contagion, and under those circumstances he could not be held liable for malfeasance or misfeasance in office, or for any other crime or misdemeanor. So, in like manner, if there was imminent danger of a plague or epidemic, the health officers of a community would unquestionably be excused by a court for taking action which in their opinion had the effect of protecting the public health.

In such cases, however, the act of the individual or of the public health officer would be subject to searching scrutiny, and it would be incumbent on such person or officer to show the justification of which we speak. Otherwise, they would be subject to fines, imprisonment and damages as provided in the proposed statute. The whole matter can be likened to a case of justifiable or excusable homicide, where the person who kills another is bound to show such justification or excuse.

We are constrained to say that the law does not in any way encroach upon the guaranteed rights of any individual afflicted with disease, and there is no feature of it which is in restraint of liberty, in derogation of property rights, or which interferes with contract obligations, or which is discriminatory so as to make the law unconstitutional; and though we can see, as stated above, that there are occasions when such a law might be violated with safety, we must hold it constitutional.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Filling in of Streets Adjacent to Quarry Hole at 91st Place.

June 25, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

We have your communication, together with memoranda, concerning an old quarry hole intersecting 91st place, in which you desire an opinion as to whether or not, in the event the City desired to grade said 91st place to the established street level, there is imposed upon the property owner or owners abutting said street the obligation to build retaining walls to prevent the "fill in" from falling over onto private property. The suggestion has been made of joining with the owner of the quarry space in completely fencing the hole, the City and the owner dividing the cost in proportion to the amount of property owned by each contiguous thereto.

For the reason that the property in question must be fenced to insure the safety of the public, and its proportionate share of this expense should necessarily be borne by the City, we shall concern ourselves with the main question of the liability for the shoring up of the street "fill in."

The court said in the case of *Roberts v. The City of Chicago*, 26 Ill. 249 :

"We recognize unhesitatingly as sound law, that the city has the right to establish and change the grades of the streets, and to compel the owners of lots to grade the streets accordingly. If the owners of lots will not themselves do this, then the law authorizes the city to do it at the expense of the owners, and when a grade is established or altered *in good faith, with the purpose of improving the streets*, the courts will not inquire whether it was the very best grade which could have been adopted, and if, upon the neglect of the owners to grade the streets, in pursuance to the city ordinances fixing the grade, the

city does it *with a reasonable care and diligence*, it is not liable to the owners of the lots for the inconvenience occasioned by necessary obstructions to the streets while they are being graded, nor for the expense of raising the buildings to conform to the new grade." (Italics are ours.)

Even in acknowledging that the opening up and grading of 91st place will result in an obligation upon abutting property owners to "shore up" said property, we are of the opinion that the cost thereof should be borne by such owners and that no liability could possibly be imposed upon the city. We accordingly advise you that you may proceed to grade 91st place, as well as East End avenue and 92d street, to the same level as the remaining portions of said streets adjoining said quarry hole, as shown on the map attached to the correspondence herewith.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Application for License to Conduct a Hospital on First Floor of Hotel.

June 25, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letters of June 14th and June 23d.

Application has been made to you for a license to conduct a hospital on the first room floor of the south wing of the

Webster Hotel. The first room floor is the first floor above the mezzanine floor of the hotel.

You wish to be advised whether this first room floor of the south wing of the hotel may be licensed as a hospital or whether the law requires the licensing of the entire hotel in which such hospital is to be located.

Your request for an opinion, we take it, is prompted by reason of the fact that the requirements of the City ordinances as to construction and equipment of buildings are not the same for a hotel as for a "building used for a hospital."

Mr. Felix J. Streyckmans, the attorney for the Webster Hotel, has presented his views to this department in reference to the matter.

He states that it is the desire of the owners of the Webster Hotel to locate on said first room floor of the south wing suitable operating rooms for the purpose of conducting surgical operations under local anaesthetics and to treat eyes, nose and throat, and to do general surgery under local anaesthetics only. No infectious diseases or cases other than surgical under local anaesthetics will be accepted. There will always be a licensed physician and nurses on hand to look after the welfare of the patients.

Mr. Streyckmans also calls our attention to provisions 1852, 1854 and 1870 of The Chicago Municipal Code of 1922. These sections provide in substance that the application for a hospital license shall state the location of the proposed hospital, the purpose for which the hospital is to be conducted, the accommodations for the inmates therein, the nature and kind of treatment proposed to be given, etc. These sections also provide that in case the hospital is conducted in violation of the terms of the application for the license, the license may then be **revoked**.

He suggests that in this case the license, in accordance with the terms of the application, be limited to said first room floor of the south wing of the hotel and to surgical operations under local anaesthetics only, and that if the licensee fails in any way to conform to the limitations of the license, the license be **revoked**.

The first proposition to be considered would seem to be the difference in the requirements of the City ordinances as to construction and equipment between a building used for a hospital and a building used for a hotel.

A hotel is classified as a Class IIb building under Clause E of Section 448 of the Municipal Code. Clause F of Section 448 creates Class IIc of buildings, and reads in part as follows:

“In Class IIc shall be included every building used for a hospital where sleeping accommodations for more than ten persons are provided in such building.”

The Webster Hotel, we are advised, complies with the various building ordinances of the City covering a Class IIb (hotel) building, but it does not comply with all the ordinances concerning a Class IIc (hospital) building.

The requirements of the City Building Ordinances for a Class IIb (hotel) building, which includes a building used for a hotel, are less exacting in the matter of fire escapes than for a Class IIc (hospital) building which includes a building used for a hospital. A building used for a hospital must have 40 inches of space between the hand rails on fire escapes. A building used for a hotel must have 24 or 36 inches of space between the hand rails on fire escapes, depending on the layout of the building.

The building ordinances also provide (Section 480) as follows:

“480. COVES IN ROOMS AND CORRIDORS OF HOSPITALS.)

In every building hereafter constructed for or converted to hospital purposes, in all corridors and rooms used by patients, all intersections of walls, floors and ceilings shall be formed with tangent coves.”

The above are differences between the requirements of the City ordinances for Class IIb (hotel) buildings and Class IIc (hospital) buildings.

Mr. Streyckmans advises us that the hotel authorities, if license for hospital is issued as requested, are willing to place fire escapes with 40 inches of space between the hand

rails thereof on the hotel from the first room floor down to the ground as required for Class IIc (hospital) buildings.

The first question presented then is whether the use of the second floor of the Webster Hotel for a hospital constitutes the building as one used for a hospital within the meaning of Clause F of Section 448 of The Chicago Municipal Code of 1922.

By the provisions of the Municipal Code buildings are placed in certain classes according to their use. Their use determines the classification and for each class certain requirements are set forth as to their construction and equipment, there being different requirements for the different classes of buildings.

The manifest purpose of such regulations is to guard against the calamities of fire and to provide protection against dangerous conditions in respect to fires.

A fire in a hotel may mean a catastrophe, but the catastrophe undoubtedly would be a great deal worse if a portion of the hotel were used for a hospital. Patients in a hospital obviously would not be as well able to care for themselves in case of fire as would the guests in a hotel. Hence the City ordinances make more stringent requirements as to fire escapes in buildings used for hospitals than in hotel buildings.

Where a building contains a hospital, even if the hospital occupies only a portion of the building, it is only reasonable that such a building be required in its entirety to conform to more exacting requirements than a building used entirely for a hotel.

Such a building having in it a hospital in our judgment is a building used for a hospital within the meaning of Clause F of Section 448 of the Municipal Code.

Clause F does not say a building must be used "exclusively" for a hospital before it becomes a Class IIc building. For instance, the different frontage consent ordinances invariably contain the words "used exclusively for residence purposes." If it was the intent of the ordinance in this case to classify as a Class IIc building only buildings used exclu-

sively for hospitals, we think the City Council would have plainly said so, and not left so important a matter to conjecture.

Such being our view of the matter, it follows that in this case the Webster Hotel should be required to conform to the requirements for Class IIc buildings before the issuance of a license for a hospital on the second floor of said hotel, in accordance with Section 726 of the Municipal Code, which reads as follows:

“726. CLASS OF BUILDINGS NOT TO BE CHANGED WITHOUT CONFORMING TO PROVISIONS OF THIS CHAPTER.) If buildings, the uses of which bring them within any of the classes mentioned in this chapter, are to be applied to the uses of any other class for which a better system of construction is required by this chapter, the construction and equipment of such buildings shall first be made to conform to the requirements of this chapter as specified for their intended use. And it shall be unlawful to use any such building for a new or different purpose from that to which its structure and equipment adapts it under this chapter, unless a permit for such alteration or use shall have been first obtained from the commissioner of buildings and the requirements of this chapter for such new or different use shall have been complied with.”

If we were to interpret this ordinance as not requiring the entire hotel building to conform to the more exacting requirements as to construction or equipment for Class IIc (hospital) buildings, then a hospital, under such a ruling, could be conducted in a portion of an office building, department store building, factory or other character of building, without the entire building being made to conform to the said more exacting requirements for a Class IIc (hospital) building.

We think the intent of the ordinance would not permit of any such interpretation. If a building in part is to be devoted to a use which requires a better system of construction or equipment than that required for the remainder of the building, by reason of its use, the entire building must be made to comply with the ordinances applicable to such new use to which a building or part thereof may be devoted.

If a fire were to occur in the Webster Hotel, the exit of the guests in the hotel must necessarily be retarded by reason of the hospital patients therein. The elevators and fire escapes instead of accommodating their usual number must give up their space to patients on cots, or patients being carried or helped to safety. Thus a hospital in a hotel increases the fire hazard of the hotel because it delays the emptying of the building in many ways in case of fire.

The hotel on the other hand increases the fire hazard of the hospital. Common experience teaches us that the same care and caution against fire is manifestly not exercised in a hotel as in a hospital. In case of fire, the patients of the hospital might have difficulty in getting to safety because of the excitement and rush prevailing and the instinct of self preservation which would impel the patrons of the hotel to seek safety for themselves, and in such an emergency or catastrophe perchance without too tender consideration for the less fortunate and less able patients in the hospital.

There are other things that might be said, but there would seem to be no room for reasonable difference of opinion that in a combined hospital and hotel building, the hospital would increase the fire hazard of the hotel and the hotel would greatly increase the fire hazard of the hospital.

As to whether in the instant case there would be such an increase in the fire hazard, in view of the proposed location of the hospital and the manner in which it is to be conducted, need not be considered. The ordinance makes no exceptions. If a license is issued for a hospital there it becomes a hospital and must comply with the ordinances applicable to the situation as above set forth.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Grand Trunk Track Elevation Ordinance—Validity of Certain Provisions.

June 26, 1925.

HON. GEORGE M. MAYPOLE, Chairman, Committee on Track Elevation.

Dear Sir :

At the meeting of the Track Elevation Committee, Wednesday, June 24, 1925, this office was requested to furnish a written opinion concerning the validity, effect and advisability of including the following paragraph or section in the pending Grand Trunk track elevation ordinance :

“Section 5. Paragraph 2. All excavations that shall be made within the limits of the subways and beneath the sub-grade of the same prior to the paving of the subways, shall be backfilled with sand, gravel, cinders or any other material satisfactory to the commissioner of public works, and flooded or tamped in such manner as to insure the full settlement of such back-filling before the pavement is laid. Provided, however, that if in the construction of any such subways and approaches it may become necessary to disturb, remove or destroy any pipes, conduits, wires or other property belonging to or leased by any private corporation or individual, said owner or lessee shall be required to assume all of the expense thereof or damage thereto, and the City of Chicago will secure to said railroad and railway companies the free and uninterrupted right to prosecute their said work, and will save said railway and railroad companies harmless from any and all claims, demands, and suits arising therefrom and all damages which may be recovered from such suits.”

The liability of affected utility companies to remove and relocate their equipment at their own expense when such removal or relocation is necessitated by a track elevation program, such as the one involved, or by any public improvement, has been so frequently, definitely and positively fixed and es-

tablished by the reviewing courts of this and other states that it no longer amounts to the dignity of a debatable question.

It is our opinion that the provision in question is valid, binding on the companies sought to be affected, confirms an obligation that is legally imposed, is a definite expression of agreement between the City and the Grand Trunk Company that the Grand Trunk Company shall not be liable for the costs in dispute, and should be included in the ordinance if it expresses the intention of your committee. In the light of established legal principles the burden of indemnity assumed by the City is trivial and amounts in practical effect to no more than an agreement to defend a more or less ordinary lawsuit that can only result in favor of the City. Our conclusions are induced by the reasons hereinafter assigned.

The rule applicable to the question presented is (1) that telephone, electric light and other utility companies take their rights in the streets and public ways expressly subject to the exercise by the City of its police power in the promotion and preservation of the public health, safety, comfort and convenience, and that any damages sustained by such companies in complying with the requirements and demands of the City in that exercise are not recoverable; and (2) that the Grand Trunk ordinance is such an exercise of the police power for the uses and purposes of the public welfare, and the fact that incidental benefit may accrue to the Grand Trunk Company does not change the real character of the improvement.

This precise situation has been passed upon in two recent cases by the Appellate Court of this state, both arising out of track elevation ordinances passed by the City Council of the City of Chicago. *Postal Tel. Co. v. B. & O. C. T. Co.*, 219 Ill. App. 304, and *P., C., C. & St. L. Ry. Co. v. Chicago City Ry. Co.*, 224 Ill. App. 380.

The *Postal Telegraph Company* case was decided in October, 1920, opinion by Mr. Justice Dever. It there appears that in 1906 the City Council passed an ordinance to the effect "That the Belt Railway Company of Chicago and the Chicago Terminal Transfer Railroad Company are each, re-

spectively, hereby ordered and required to elevate the plane of their roadbeds and tracks within the limits of the City of Chicago in manner and upon the conditions hereinafter specified, that is to say," etc.

An amendment to the ordinance provided for the depression of streets at the intersections mentioned, and the telegraph company was compelled to rebuild and lower its conduits at an expense in excess of \$2,000, the amount for which it sued. The ordinance contained this provision:

"If in the construction of any of said subways and approaches it shall become necessary to disturb, remove or destroy any pipes, conduits, wires or other property belonging to any private corporation or individual, all of the cost and expense thereof, and all damage thereto shall be borne and assumed by the City of Chicago, and the said city * * * will save the said railway and railroad companies harmless from any and all claims, demands and suits arising therefrom and all damages which may be recovered therefrom."

The trial court held that the telegraph company could not recover the expense it had been put to, and this judgment was affirmed by the Appellate Court. In the course of that court's opinion, it is said (p. 306):

"The plaintiff (telegraph company) had a right under an ordinance of the City of Chicago to place its conduits, cable, etc., under the surface of the streets at the intersection mentioned. The defendant, prior to the passage of the track elevation ordinance, was legally occupying parts of this intersection with its tracks. Both plaintiff and defendant are public utility corporations, and their occupancy of the public highways was at all times subject to the right and power of the City of Chicago to compel a relocation of conduits, wires and tracks as the City might see fit to require in a reasonable and just effort to provide for the public health, safety and convenience."

The principal contention of the telegraph company in that case was that the track elevation ordinance was not mandatory; that it was permissible only and was enacted for the benefit of the railroad company; that the amendment to

the ordinance providing for the depression of street intersections was likewise for the benefit of the railroad company in that it kept the elevation at a minimum height and thus minimized the cost of construction at the ultimate expense of the telegraph company in that, had the level of the elevation been fixed at a plane sufficiently high to obviate the necessity of street depression, there would have been no occasion for the relocation of the telegraph company's equipment. The foregoing objections are substantially those raised by the affected utility to the pending Grand Trunk Ordinance.

In its consideration of the propositions thus advocated in the *Telegraph Company* case, the court said (p. 307) :

"We are unable to agree with this contention and the cases relied upon by plaintiff do not, in our opinion, support its position on this question.

It is conceded that the City of Chicago in the reasonable exercise of its police power has a legal right, where public safety or convenience requires, to change the grade of a street and that in so doing the City would be free from liability to a telegraph company whose conduits or property is disturbed in making the change."

In that case the ordinance did not require the telegraph company to remove or relocate its equipment, yet the court said (p. 308) :

"The ultimate object to be attained by the passage of the ordinance was the elevation of defendant's (railway company's) railroad tracks. The amendment requiring the depression of the surface of the street became an integral part of the ordinance, and in determining the purpose of the City Council in passing it, the amendment and the original ordinance should be read together. It is apparent from the language used that the intent of the City Council in enacting the ordinance was to prevent the inconvenience and danger to the public arising from the operation of railroad trains on the surface of the street, and the provision which provided for a depression of the street surface at Cicero avenue had no other object than that of providing a reasonable manner and method of changing the grade of the tracks. It may be quite true, as urged,

that this particular provision of the ordinance tended to make the work less expensive, but it is reasonable to suppose that the City Council was moved to adopt the amendment so that the whole ordinance might, in a reasonable way, provide for an elevation of the tracks."

Commenting on this latter proposition, viz: that the street depression provision is for the benefit of the railroad company in that it tends to minimize the cost of the elevation, and considering the contention of other affected utilities that in such state of the case the depression is in the nature of a private improvement, and that, therefore, the defense of police power may not properly be urged against the claims of such affected utilities, momentary analysis immediately discloses that such a contention is idle and foolish. In the first place, as stated by Mr. Justice Dever in the case last quoted from, it is reasonable to suppose that the City Council provided for the depression so that the whole ordinance might, in a reasonable way, provide for an elevation of the tracks. And it follows from this that unless it can be made to appear that an ordinance providing for such a depression, in view of the circumstances and conditions involved, is a flagrant abuse of legislative discretion, the courts will not disturb it. And up to date no court, so far as we know, has held such provision an abuse of legislative discretion.

The underlying theory of this whole procedure clearly demonstrates that any other conclusion would be wholly untenable. Both the railroad company and other affected utilities are private corporations, subject at all times to reasonable impositions levied under the police power, and the nature and extent of their rights in public streets are identical. If the City can compel the elevation of railroad tracks over a street, it is obvious that it can compel the lowering of other utility equipment in the same street and at the same point, where the motive that induces the improvement, viz: the public welfare, is the same in both instances. There is no distinction in principle, and the only distinction in fact is that one goes up and the other down.

If the City has any right to compel a grade separation in the interest of public safety, there is no good reason to suppose it may not require the participation, to the extent indicated, in the cost of the improvement of the utility companies whose equipment is in that street, be it railroad tracks, telephone, telegraph, or electric light wires or what not. The same jurisdiction is conferred on the Illinois Commerce Commission, and that body continually exercises it in the manner herein suggested. Each company can, of course, only be charged with such expense as its particular equipment necessitates, but that is all the ordinance in question seeks to impose.

In response to the contention made by the Postal company in the case herein cited, viz: that the track elevation ordinance there involved was permissible only, and not mandatory, and, therefore, enacted for the benefit of the railroad company, the court said (p. 308):

“The ordinance was something more than a mere offer on the part of the City Council to permit the railroad company to elevate the tracks and to construct subways thereunder for street openings. While it provides that it was to become null and void if not accepted within 60 days from date of its approval, this fact in and of itself is not sufficient to establish a mere contractual relationship between the parties thereto. On its face the ordinance explicitly ordered and required defendant’s predecessor to comply with its terms, and the language employed clearly indicates a purpose to provide, under the police power of the City, for the public welfare. The ordinance does not appear to have been enacted in the interests of the railroad companies against which it was intended to operate.”

The same language applies with equal force to the Grand Trunk ordinance. Section 1, Paragraph 1, of that ordinance provides:

“That the Grand Trunk Western Railway Company * * * are each, respectively, hereby authorized and *required* to elevate the plane of their roadbeds and tracks within the limits of the City of Chicago, in

the manner and upon the conditions hereinafter specified," etc.

The ordinance explicitly requires the railroad companies to comply with its terms, and, as was said in the opinion last quoted from, "clearly indicates a purpose to provide, under the police power of the City, for the public welfare. The ordinance does not appear to have been enacted in the interests of the railroad companies against which it was intended to operate."

This ought to dispose of any contention that the Grand Trunk ordinance provides for a private and not a public improvement. On the same proposition the same court in considering substantially the same questions, in the case of *P., C., C. & St. L. Ry. Co. v. Chicago City Ry. Co.*, 224 Ill. App. 380, by Mr. Justice Morrill, said (p. 397):

"The track elevation ordinance was enacted by the City under its police powers for the purpose of making the street safe for all persons using it, including the traction company and its patrons. It established a new street grade in Fifty-ninth street. Under the traction ordinance the traction company had the right to use a portion of the street in operating its cars, but was obligated to make the grade of the tracks conform to any change in the grade of the street. *The track elevation was ordered by the City Council* not for the benefit of the railway company, but for the protection of the public."

To the same effect is the case of *People v. Grand Trunk Western Ry. Co.*, 232 Ill. 292.

Accordingly, although the Grand Trunk ordinance is contractual in form, it is an exercise of the police power for the benefit, welfare and protection of the public, and has all the force and scope of a general ordinance. It is, therefore, eminently fair and proper to include the disputed provision in the ordinance, and such inclusion is clearly without prejudice to other affected utilities. If, on the contrary, the improvement is a private improvement for the benefit of the railroad companies and the City is without

power to impose the disputed burdens on such other affected utilities, then the provision is bad and does not foreclose or prejudice in any degree those other companies. The contractual form of the ordinance cannot minimize the truth of the proposition that it is an exercise of the police power for the public welfare. The same result could be obtained by a mandatory ordinance against the railroad companies and the other affected utilities, and against such a mandatory ordinance the objections being urged to this one could hardly prevail. The form of the ordinance is of no importance. The purpose and intent are the determining factors.

In considering the relative rights of the traction company in the *Chicago City Ry. Co.* case just cited, the court said (p. 397, *et seq.*) :

“The traction company is not in the position of an abutting property owner who has suffered special damages on account of an unreasonable change in the grade or use of a street and is not within the rule under which it claims compensation. While it is true that the traction company has a property right under its franchise in its equipment which it has installed in availing itself of the privileges granted by the traction ordinance, it has no property right in the location, with reference to the street grade, of any of its substructures or surface equipment. The traction company accepted its franchise subject to the condition that it would conform at its own expense to any regulations not arbitrary in their character as to the use of streets, which might from time to time be established by the City.”

In the case of *New Orleans Gas Light Company v. Drainage Commission of New Orleans*, 197 U. S. 453, the Drainage Commission found it necessary to remove and relocate certain gas mains of the company in order to facilitate the construction of the drainage system. The gas company sought to recover its expenses in that behalf, but the trial court and the Supreme Court of Louisiana held against it. The case was ultimately taken to the U. S. Supreme Court, where the holding of the state courts was affirmed. And it was there (U. S.) said (pp. 461-2) :

“The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made. * * * We think whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. * * * In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.”

And this rule works no hardship on the companies. It was pointed out in the *New Orleans* case the rights of a utility company in a city street are at all times subordinate to the right of the municipality to make public improvements and exercise its police or legislative powers, and in contemplation of law the express consent of the utility company to any reasonable exercise of that power is read into and considered a part of such utility company's franchise or agreement with the City. The law, by imposing the duty, implies an agreement upon the part of the utility company to be so bound, and having so agreed, the company cannot later be heard to complain that it has done so or is required to do so. The law in that respect is just as much a part of the company's agreement or contract with the City whereby it obtained its right to lay its equipment in the public ways of the City as any of the provisions or terms fixed in express language, and is just as binding. And having thus agreed to so comply with any reasonable demands of the City in the exercise of the police power, it is idle and foolish to suggest, let alone contend, that any rights of such affected utility have been violated or infringed by the fruition of a contingency it must be held to have contemplated and set up in its franchise contract or ordinance.

It is sometimes contended as a premise to the idea that were it not for the presence of the railroad tracks in the street, the costs and expenses herein discussed would not

be occasioned, and, therefore, the railroad company should bear such costs. It might with equal force and truth be said that if it were not for the presence of other utility equipment in the streets this question would never have arisen. All utility companies in the streets are there on the same basis, and as hereinabove pointed out there is no good reason why the City may not, in effect, apportion the cost of a grade separation among them by requiring each to conform its own equipment to the grade as newly established.

The principles announced are tenable and established and in complete accord with the weight of authority. (See also *People v. G. T. W. Ry. Co.*, 232 Ill. 292; *Murphy v. C. & P. Ry. Co.*, 247 Ill. 614; *Weage v. C. & W. I. R. R. Co.*, 227 Ill. 421; *Cincinnati I. & W. Co. v. Connersville*, 218 U. S. 336; *Cicero & P. St. Ry. Co. v. Chicago*, 176 Ill. 501; *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453; *National Waterworks Co. v. Kansas*, 28 Fed. 921; *C. B. & Q. R. R. Co. v. Chicago*, 166 U. S. 226; *Brooklyn El. R. Co. v. Brooklyn*, 37 N. Y. Supp. 560; *Middlesex R. R. Co. v. Wakefield*, 103 Mass. 261; *Michigan Tel. Co. v. Charlotte*, 93 Fed. 11; *Coburn v. Bossert*, 40 N. E. [Ind. App.], 281; *Kirby et al. v. Citizens Ry. Co.*, 48 Md. 168; *C. B. & Q. R. R. Co. v. Quincy*, 136 Ill. 563; *C. & N. W. Ry. Co. v. Chicago*, 140 Ill. 309-323; *Grand Trunk Western Co. v. South Bend*, 227 U. S. 544, and many others.)

It is our conclusion, therefore, that the provision in question is valid, that it lawfully accomplishes the purpose it seeks to accomplish, and that it ought to be included in the ordinance, otherwise another ordinance might be necessary to accomplish the same purpose.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Separation of City of Chicago from State of Illinois.

June 30, 1925.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF
CHICAGO:

Gentlemen:

In response to the resolution passed by your Honorable Body on June 24, 1925, in which you direct the Corporation Counsel to submit an opinion as to the proper legal procedure to be followed in effecting a separation of the City of Chicago from the State of Illinois, we submit the following:

As stated in the preamble of the resolution calling for this opinion, the method of dividing a state, or separating a portion of it from the whole and forming such portion into a new state, is controlled by the following clause of Section 3 of Article IV of the Constitution of the United States:

“New states may be admitted by the Congress of this Union; but no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress.”

Since the adoption of the Constitution of the United States there have been four instances of a division of a state into two states. Vermont was separated from New York, Maine from Massachusetts, Kentucky from Virginia, and later West Virginia from Virginia.

It is said that the jurisdiction of New York over Vermont was always questionable and that the separation of Vermont is not a good example of real division. Likewise, it may be said that in the case of West Virginia the consent of the legislature of the State of Virginia was obtained through a subterfuge.

Nevertheless, in each case the process of going through the form of obtaining the consent of the legislature of the parent state was observed. Hence, the precedent is established that the meaning and interpretation of the above quoted provision, as was obviously intended, is that a new state may be created out of a part of the territory of a single state, provided the legislature and Congress consent thereto. We mention this, because in the early days of the republic, and especially at the time when the separation of Maine from Massachusetts was being agitated, it was contended by the opponents of separation that the peculiar punctuation of the clause had a great significance, and that the portion between the two semicolons absolutely prohibited the creation of a new state out of a portion of a single state, and that the provision for the consent of the legislatures and of the Congress related only to the formation of a state out of two or more states or parts of states.

There is no precise method which must be followed in effecting such a separation. The initial step may be in the form of a petition to the General Assembly asking it to consent to a separation, but the legislature may, if it sees fit, act on its own initiative. If a petition is prepared it should ask the legislature to pass an act consenting to the forming of a new state, defining its boundaries, and either calling for an election to determine whether or not the people of the proposed state desire to form a separate government, or calling for the election of a convention to determine this question. If the former method is employed, provision should be made in any event for the election of a constitutional convention for the purpose of drafting a constitution.

The consent of the legislature may be given in the act setting the machinery in motion, or it may be withheld until the creation of the new state is about to be consummated and consent is asked by the convention which frames the constitution. The legislature would also be called upon to arrange the details of the separation with respect to the division of the public property and public obligations. It will thus

be seen that practically the entire matter, so far as the legal procedure is concerned, rests with the legislature.

It is sometimes said that the Ordinance of 1787 prevents the formation of a new state such as is proposed. There is, however, no authority for such a view. The Ordinance of 1787 was passed by Congress sitting under the Articles of Confederation prior to the adoption of the Constitution. It was designed to provide for the government of the territory of the United States northwest of the Ohio River. It contemplated the creation of not less than three states, with provision for two more under the conditions named therein. It cannot be said, however, to govern the question of the formation of states or the division of states at the present time. That is controlled by the Constitution of the United States adopted after the said Ordinance of 1787 was adopted, under which the procedure outlined above is possible.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Relocation of Public Utility Corporations' Property
Upon Construction of Subways for Transportation
Purposes.**

June 30, 1925.

HON. JOHN J. COUGHLIN, Alderman, First Ward.

Dear Sir:

Replying to your verbal request for a legal opinion concerning the right of the City to require privately owned utility companies to remove, temporarily maintain and relocate

their property, without expense to the City, in event the City should construct a system of subways to be used in whole or in part for local transportation purposes, we beg leave to call your attention to the opinion and report covering this question submitted on January 19, 1923, to Major R. F. Kelker, Jr., Consulting Engineer of the Local Transportation Committee, by Messrs. William H. Sexton, Stephen A. Foster and Jerome N. Frank, Special Counsel for the Local Transportation Committee.

That opinion, which is very full and complete and exhaustively considers all the decisions pertinent to the question, is printed at page 144 of the "Report on a Physical Plan for a Unified Transportation System for the City of Chicago," which was submitted to the Local Transportation Committee by Major Kelker, on May 22, 1923. In that opinion it was held that the utility companies must remove, maintain and relocate their property now placed in the public streets under authority of ordinance grants at their own expense. We shall be glad to provide and send to you a copy of said opinion if you so desire.

Very truly yours,

C. M. DOTY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Payment of Reserve on Contract for Tractors.

July 2, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of a letter from the Auditor with respect to payment of a voucher in favor of S. S. Evans Co.,

for the sum of \$4,225, on which no reserve of 15 per cent has been deducted. The Auditor inquires whether it is proper and lawful for the City to make payment without deducting such amount pending the final completion of the contract.

This contract was authorized by order of the City Council on January 2, 1925 (see Council Journal, page 4389), and is a contract for a certain number of tractors, all of which are to be delivered at one time, and payment therefor is to be made at the rate of a certain amount per month. It appears from the correspondence and data presented to us that all of these tractors were delivered a long time ago, and that these deferred payments are the ones that the Auditor is inquiring about.

The provision of the code with respect to reservation of payment has reference to contracts on which the contractor has not completed his work or his deliveries. We do not think it would be proper to apply the rule of deducting 15 per cent in the case of materials or supplies or implements of this kind where delivery is complete. The reservation would be proper up to the time that the last of the tractors were delivered. But since they were all delivered, we see no objection to the payment of the voucher as drafted, and think it would be entirely unlawful.

We return herewith letter addressed to you from the Commissioner of Public Works and the voucher.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Occupancy as Work-Shop of Second Floor of a Garage.

July 6, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You have enclosed a letter prepared by you to be sent to the Superintendent of Police requesting him to close the first floor of a building located at 114 East 45th street, Chicago, Illinois. In said letter you state that the first floor is occupied by twelve automobiles, the second floor by a garment shop employing fifteen employes, and the third floor is vacant; that the storage of automobiles on the first floor constitutes a violation of Section 1398 of the Chicago code of 1922, and that there is no license of any kind issued by the City of Chicago permitting the storage of automobiles as aforesaid; that on May 29, 1924, a fine of \$200 was imposed upon the owner of the building for storing automobiles as aforesaid, but that automobiles are again stored on the first floor in violation of law.

You request this office for an opinion whether you have the power to request the Chief of Police to close the first floor, and further request that we approve your letter and forward it to the Chief of Police.

Section 1532 of The Chicago Municipal Code of 1922 provides as follows:

“Any building, structure, enclosure, place or premises perilous to life or property by reason of the nature, condition or quantity of its contents or its use, or the overcrowding at any time of persons therein, or by reason of deficiencies in such fire alarm or fire prevention equipment as may be required by the provisions of this chapter, is hereby declared to be a nuisance and within the meaning of the word as used in this ordinance, and the Chief of Fire Prevention and Public Safety is em-

powered and directed to cause any such nuisance to be abated."

You are given the power to call upon the Chief of Police for aid in enforcing the fire prevention ordinance by Section 1279, which provides as follows:

"Whenever it shall be necessary, in the opinion of the Chief of Fire Prevention and Public Safety, to call upon the Department of Police for aid or assistance in carrying out or enforcing any of the provisions of this chapter, he shall have the authority so to do, and it shall be the duty of the Superintendent of Police, or of any member of the police force, when called upon by said chief or his duly authorized agent, to act according to the instructions of and to perform such duties as may be required by him, in order to enforce or put into effect the provisions of this chapter."

If, in your opinion, the use of the said building constitutes a nuisance as defined by Section 1532, aforesaid, you have the power to call on the Chief of Police for aid in abating said nuisance by closing up the first floor of the structure until such time as the owner uses it properly. In pursuing this method, it is our advice that you make certain that the use of the structure does constitute a fire hazard and that it is a nuisance, and, further, that you have competent witnesses who can testify in court if necessary to that effect.

It is not customary for this office to approve letters sent by one department head to another, and accordingly we are returning the letter to you and suggest that you send the same to the Chief of Police together with a copy of this opinion, if you so desire.

Yours very truly,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Claim for Refund of Factory and Work Shop License Fees.

July 7, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You referred to us a letter which you received from the law firm of Norman, Poppenhusen, Stern & Johnston, in which they claim a refund of \$1,000 for work shop license fees collected from Interstate Iron and Steel Company.

It is stated in the letter of the attorneys that the payments in question were made May 15, 1922, and May 4, 1923; that they were paid by vouchers on the face of which there was a protest and a reservation of the right to make claim for reimbursement in case the ordinance should thereafter be declared unconstitutional.

The law in this state on the subject of refunds in case of the payment of illegal license fees is not as clearly defined as it might be; nevertheless, the tendency of the courts has been to adhere to the general principle laid down in Dillon on Municipal Corporations, from which we quote the following:

“Actions against a municipal corporation to recover back money upon the ground of the *illegality of the tax or assessment* are, upon principle and the weight of authority, maintainable when, and in general only when (if there be no statute enlarging the liability) the following requisites co-exist: 1. The authority to levy the tax, or to levy it upon the property in question, must be *wholly wanting*, or the tax itself wholly unauthorized, in which cases the assessment is not simply irregular, but absolutely void. 2. The money sued for must have been *actually received* by the defendant corporation, and received by it for *its own use*, and not as an agent or instrument to assess and collect money for the benefit

of the state or other public corporation or person. 3. The payment by the plaintiff must have been made *upon compulsion*, as, for example, to prevent the immediate seizure of his goods or the arrest of the person, *and not voluntarily*. Unless these conditions concur, *paying under protest* will not, without statutory aid, give a right of recovery. The same principles are applicable to actions for the recovery back of money paid for *illegal license taxes or fines* imposed by a municipal court."

Dillon on Mun. Corp. (5th Ed.), Sec. 1617.

There are many cases in this state where it is held that protest alone without such duress as amounts to compulsion will not give the right to a refund of the fee (*Schoden v. Schaefer*, 184 Ill. App. 471); the United States Supreme Court is pronouncedly on record on this point (*Un. Pac. R. Co. v. Dodge County*, 98 U. S. 541.)

Unless there should be an adverse decision in a case now pending, which will unquestionably go to the Supreme Court, we will not advise the return of fees collected under the circumstances named in the letter above referred to.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Civil Service Status of Assistant Engineer Who Resigned and Seeks Reinstatement.

July 7, 1925.

HON. WILLIAM F. FOEHRINGER, Secretary, Civil Service Commission.

Dear sir:

You state that the Civil Service Commission has a request from the president of the Board of Local Improve-

ments to cancel the resignation of Herbert E. Hudson and restore his name to the reinstatement list for the position of assistant engineer, so that he may be eligible to take the promotional examination for the position of assistant chief engineer, and you ask whether or not such request can legally be complied with.

Mr. Hudson's resignation as assistant engineer is dated June 12, 1919, and by its terms is "to take effect immediately upon (his) failure to report for work at the expiration of leave of absence granted (him) for twelve months from June 12, 1919, said leave expiring on June 12, 1920." The head of the department filed said resignation with the commission, and no request ever was made for its withdrawal until the present application therefor by the president of the Board of Local Improvements. Mr. Hudson availed himself of the leave of absence granted, has never reported to the head of his department to be reinstated in his position nor have his name placed on the eligible register for certification on account of the filling of his position during his absence.

Upon the foregoing facts it is impossible for the commission to comply with the present request for the withdrawal or cancellation of Mr. Hudson's resignation, without violating the following rules of the commission:

Sec. 2 of Rule IX provides that

"The commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing of the same, provided, the head of the department concerned approves of such withdrawal and cancellation."

In this case there is neither application for such withdrawal and cancellation by Mr. Hudson, nor an approval thereof by the head of his department within the limited period of thirty days prescribed by the rule.

Sec. 3 of Rule VIII provides that

"The head of a department may grant leave of absence to an officer or employe * * * for such period as he sees fit, not exceeding one year."

Mr. Hudson's leave of absence expired June 12, 1920, and his continued absence till now amounts to a complete abandonment of his position and the right of reinstatement thereto. To grant the request of the head of the department for reinstatement at this time would be, in effect, to approve a leave of absence for a period of five years. The same rule explicitly states that "No leave of absence shall exceed one year."

Sec. 4, of Rule VIII, provides that "Upon the expiration of a leave of absence, an officer or employe shall report to the head of the department and be reinstated in his position." This rule Mr. Hudson has not complied with. Right to reinstatement is predicated upon an observance of this rule.

These rules, which the commission, by Section 4 of the Civil Service Act, is directed to make, have the force and effect of the provisions of the act itself, and the failure to apply them in this case would, in our opinion, involve the integrity of the commission in the legal enforcement of Sections 8 and 9 of the Civil Service Act, having to do with registers of persons eligible to civil service positions and their rights by promotional examination to attain higher positions in the service.

We do not believe the request in this case can be complied with regularly and legally.

Very truly yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Public Garage Built as Part of Office Building—
Status as to Jewelers Building.**

July 8, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of July 2 requesting the views of this department.

Plans have been submitted, you state, and formal application has been made to you for a building permit for the Jewelers Building, which is to be situated on a tract of land surrounded by South Water street, Wabash avenue, Holden court and Haddock place.

The building will be 40 stories high, and will front on South Water street. For the first 23 stories it will be 160 feet 8 1/4 inches wide and 140 feet 2 inches deep. Above the twenty-third story the building will be in the form of a tower 68 feet wide by 78 feet long and will continue upward for seventeen additional stories. The building will be a combination office building and public garage.

Starting at the second floor, and continuing upward to and including the twenty-third floor, about 27 per cent of each floor will be used for public garage purposes and about 73 per cent for office building purposes, the public garage portion of said floors being 68 feet by 90 feet.

The garage portion of the building will utilize that space ordinarily devoted in office buildings to a light court. On three sides the garage portion of the building will be surrounded by the office space portion of the building. On top of the public garage portion and resting mainly upon it will be the 17-story tower, containing offices.

From the second floor upward to and including the 23d floor the public garage portion of the building will be sep-

arated from the office portion of the building by walls of solid masonry ; and over the public garage portion of the building will be a fireproof roof separating it (the garage portion) from the seventeen-story tower which is to be used for office and kindred purposes. The public garage section of the building will have accommodations for 572 automobiles.

Above the 23d floor the tower seventeen stories in height will be superimposed partly on the portion of the building used for public garage purposes and partly on that portion used for office purposes, but it appears that about 90 per cent of the tower will rest upon that portion of the building used for public garage purposes.

The basement of the building will be used as an entrance to the public garage. After entering the basement from Wabash avenue the automobiles, by means of elevators and electric automatic devices, will be taken up to the different floors of the public garage. About two-thirds of the basement of the building will be used in connection with the facilities for loading and storing and delivering automobiles. A fireproof wall will separate that part of the basement so used from the remainder of the basement, though said fireproof wall has in it an opening to a waiting room, apparently on public property, and from this waiting room access may be had to the non-garage portion of the basement.

The entire building will be of fireproof construction and the public garage part, you state, will be entirely cut off, except in the basement, from the remainder of the building by fireproof walls and fireproof roof. The building, you state, will be occupied for two different uses and will not consist of two adjoining buildings.

You wish to be advised, first, should buildings used to house automobiles be occupied and used exclusively for such purpose : and second, can any part of a building of any other class than Class 1 be used for the storing and housing of automobiles, or in other words for garage purposes?

Because of the gigantic character of this contemplated improvement, its importance to its owners and the City, as

well as its manifest effect on the taxable values of property, we have inspected the proposed site, conferred with representatives of the building corporation and given the most careful consideration to the matters presented.

1. Should buildings used to house automobiles be occupied and used exclusively for such purposes? Section 456 of The Chicago Municipal Code of 1922, to which you direct our attention, reads as follows:

“456. BUILDINGS FOR HOUSING MOTOR DRIVEN VEHICLES.) (a) Every building or structure hereafter erected and every existing building or structure hereafter increased in size or otherwise altered or hereafter converted or used for the purpose of housing five or more self-propelled vehicles, or other wheeled machines, containing in the tanks thereof volatile inflammable liquid for fuel or power, and all adjoining buildings and structures not separated therefrom by dividing walls of brick or concrete extending at least three feet above the roof and having openings, if any, protected on both sides by approved automatic fire doors, where such building or structure is more than one story and less than four stories in height shall be of fireproof construction throughout, or shall be equipped throughout with an automatic sprinkler system.

“Where any such building is two stories or less in height and complies in all other respects with the requirements for fireproof construction and the second floor area is co-extensive with the area of the building and without openings other than for stairs and elevators, such one or two-story building as aforesaid may have a roof of ordinary, slow-burning or mill construction.

“Where any such building two stories or less in height has a mezzanine floor or floors with a total area larger than twenty per cent of the area of the building, it shall be considered an additional floor and that part or those parts of building containing such additional floor or floors shall be separated from every other part of said building by a wall of brick or concrete built of thickness as required for enclosing walls by the provisions of this chapter, and such parts of a building so separated by such dividing wall shall have no openings in their floors from story to story other than is required for stairs and elevators. The openings connecting the different areas

of such buildings shall be protected by double automatic fire door equipment.

“Every such building or structure more than three stories in height shall be of fireproof construction throughout and shall be equipped throughout with an automatic sprinkler system. In all such buildings more than two stories in height all window openings, except in walls that adjoin a public street fifty feet or more in width, shall be equipped with approved metal frames and sash glazed with wire glass. Buildings less than three stories high shall comply with the requirements of section 784 of this chapter. All floor openings in non-fireproof buildings shall be enclosed in walls of masonry of such thickness as required by the provisions of this chapter and shall extend from the ground through the roof of the building; in fireproof buildings, all elevator shafts and other vertical shafts except stairways shall be enclosed in every story with walls of brick, tile, plain or reinforced concrete at least eight inches thick, all stairways shall be enclosed in every story with walls of brick, tile or reinforced concrete at least four inches thick, and all openings in such enclosing walls shall be equipped with approved automatic or self-closing fire doors. There shall be no basement in any such building except for boiler room purposes, unless such building, including the roof and the protection of the roof beams and roof girders, is of fireproof construction throughout and is equipped throughout with an automatic sprinkler system, and with no floor openings between the basement and other floors except for stairs and elevators, and such openings shall be enclosed in both the basement and first floor by walls of brick or concrete at least eight inches thick or of fireproof tile at least twelve inches thick and equipped with doors as hereinbefore specified. There shall be no openings from the boiler room except to the outside of the building. Where such building is on a lot that adjoins two streets or a street and an alley whose established grades are not at the same elevation the story whose floor is higher than two feet below the lower of these grades shall, for the purpose of this section, be deemed the first story of said building.

“(b) Every building, structure or place not now used for the housing of four or less vehicles containing volatile inflammable liquid in the tanks thereof but hereafter converted to such use, and every building or structure hereafter erected for the housing of four or less such

vehicles, where so used, must be occupied and used exclusively for such purposes under the following conditions and with the exceptions hereinafter noted:

“Frame sheds or buildings may be so used if such shed stands at least five feet from every other building or structure on the same lot or plot of ground; provided, however, that in frame buildings used exclusively for class I purposes a portion of such building may be so used if the part so occupied is separated from all other parts of the building by a brick dividing wall extending three feet above the highest point of the roof, and in such dividing wall all openings, if there are any, shall be equipped with standard automatic or self-closing fire doors on each side of the wall.

“Brick buildings with roof of ordinary construction may be so used if they are located three feet or more from every other building or structure upon the same lot or plot of ground. In buildings of ordinary, slow-burning or mill construction used exclusively for class I purposes, four or less such vehicles may be housed, provided that part of the building so occupied is separated from all other parts of such building by a brick wall extending three feet above the highest point of the roof and in which the openings, if any, are equipped with approved automatic or self-closing fire doors on each side thereof. If such building is more than one story high, in lieu of extending the hereinbefore required wall through the upper stories and through the roof as described, the floor system immediately above the space in which such vehicles are kept may be built of fireproof construction connecting with a wall which separated such space from other parts of the building and which is carried through the story so occupied by such vehicles.

“Brick buildings with a roof of fireproof construction may be so used and may adjoin any other building or structure, but no openings shall connect the same with any building other than a building of class I.

“Buildings containing not to exceed one living apartment and in which four or less vehicles containing volatile inflammable liquid are housed, must have brick or masonry walls and not exceed two stories in height. The floor of the second story shall be of fireproof construction throughout or if of combustible material shall be protected on the underside for the entire area of such floor by two complete coverings of metal lath and fire-resisting plaster, applied separately. There shall be two stair-

ways from said apartment to the ground placed as far apart as practicable, one of which may be an outside stairway. The interior stairway or stairways shall be enclosed on the first floor by partitions of four-inch tile or partitions of metal lath and plaster on metal studding in such a manner that exit by means of the stairway shall be direct to the outside of building, and there shall be no doorways or other openings from the enclosure containing such stairway into the first story."

You will note that the above section contains two paragraphs, A and B. Paragraph A refers solely to buildings used to house *5 or more automobiles*, while Paragraph B refers solely to buildings used to house *4 or less automobiles*.

Not a word is contained in Paragraph A that buildings regulated thereby and used to house *5 or more automobiles* must be used exclusively for garage purposes. Paragraph B, on the other hand, specifically provides that buildings regulated thereby and used to house *4 or less automobiles* "must be occupied and used exclusively for such (garage) purposes" under certain specified conditions and with certain stated exceptions.

What was the intent of the City Council? In seeking to ascertain the intent of Section 456, we must, of course, consider the entire section. Paragraph A provides most rigid and stringent regulations for buildings which are to house 5 or more automobiles, in the way of fireproof construction, automatic sprinkler equipment, automatic fire door equipment, brick enclosed elevator shafts and stairways, etc., etc., depending on the size and character of the structure.

Paragraph A further provides that a building more than three stories high used for the purpose of housing *five or more* motor cars, as in the instant case, must be fireproof throughout and equipped throughout with an automatic sprinkler system; all elevator or other vertical shafts except stairways must be enclosed with walls of brick, tile or concrete eight inches thick; all stairways must be enclosed with walls of brick, tile or concrete four inches thick; all openings in enclosing walls must have automatic fire doors; there must be no opening

from the boiler room except to the outside of the building, etc., etc.

Under Paragraph B no such severe requirements are made for buildings used to house four or less automobiles. But the City Council evidently had in mind that certain buildings should be confined, where so used, to the housing of automobiles exclusively, and that there would be an element of danger in permitting such buildings to be used for other purposes in addition to housing automobiles. It therefore provided in Paragraph B that certain buildings used for the housing of four or less automobiles must be used exclusively for that purpose.

We reiterate that there is not a word or suggestion in Paragraph A which seeks to restrict the use of buildings housing five or more cars to such (garage) purposes. If the City Council had so intended to restrict the use of such buildings to such purposes, in our opinion it would have said so. All the council needed to do was to insert the same phrase in Paragraph A that is contained in Paragraph B, to wit, "must be occupied and used exclusively for such (garage) purposes."

But the council did no such thing, although it had the matter in view as evidenced by the prohibition contained in Paragraph B as to buildings used to house four or less motor cars.

What did the City Council do? In place of requiring that buildings used for the housing of five or more motor cars be used exclusively for such purposes, it provided such strict requirements in the way of construction and equipment as would render such buildings safe even though they might be used for other purposes in addition to housing automobiles.

We think, therefore, that, under the present condition of the City ordinances, the provision in Section B limiting buildings which must be used exclusively for the housing of motor cars to certain buildings housing four or less cars, is the exclusion of such a requirement in regard to all other buildings used for the housing of automobiles.

The ordinance is clear that buildings used to house four or less automobiles must be used exclusively for such purposes except in the few exceptions mentioned in Paragraph B of Section 456, as set forth above.

Buildings, however, used to house five or more automobiles need not be used exclusively for such purpose, such buildings, however, being required to comply with the requirements of Section 456, Paragraph A, as to construction and equipment, which provisions seemingly take the place of the requirement that such buildings be used exclusively for garage purposes.

Can any part of a building of any other class than Class I be used for the storing and housing of automobiles, or in other words, for garage purposes?

Paragraph B of Section 448 of the Revised Municipal Code reads as follows:

“(b) CLASS I.) In class I shall be included every building used for the sale, storage or manufacture of merchandise other than department stores as described in this chapter. Also such buildings, structures or places with a ground area of five hundred square feet or more used as and for the purposes of a barn, stable or garage or for the housing or keeping of automobiles.”

The Jewelers building is to be combination office building and public garage. By the terms of Section 448, Paragraph B, of the Municipal Code, a building with a ground area of 500 square feet or more used for the purpose of a garage is classified as a Class I building. Paragraph D creates Class IIa of buildings which includes a building used for office purposes. The Jewelers building, therefore, is to be used for Class I (garage) and Class IIa (office) purposes.

We presume, therefore, your question differently stated is this: Must a building used in part for Class I (garage) purposes and in part for Class IIa (office) purposes comply in its entirety as to construction and equipment with the provisions for Class I buildings?

Section 449 of the Municipal Code to which you call our attention reads as follows:

“449. BUILDINGS USED FOR THE PURPOSE OF MORE THAN ONE CLASS.) Where any building is used for the purposes of two or more classes, as herein specified and defined, such portion of any such building as is devoted to the uses and purposes of any particular class shall be constructed, operated and maintained in accordance with the requirements of this chapter relating to such class, unless such construction shall, in the opinion of the commissioner of buildings, prove impracticable, or unless there would be a conflict between the provisions of this chapter relating to the construction of buildings, in either of which cases the construction requirements which relate to and govern the construction of buildings of the class requiring the best and safest form of construction shall govern the entire building.”

This section peculiarly fits the situation of the proposed Jewelers building. Where a building is used for two classes, as is that building, the part to be used for each respective class shall be constructed according to the respective requirements relating to such class unless (1) the Building Commissioner deems that impracticable, or (2) unless there would be a conflict in the ordinances relating to the construction of buildings. In either of these two cases the construction requirements relating to the class of buildings requiring the best and safest form of construction shall govern the entire building.

As we understand it the numerical order of the various classes of buildings does not determine the superiority of one class over another.

Class I is not necessarily safer or better than Class II; Class II than Class III; Class III than Class IV, etc. It depends, as we see it, on the purpose for which a building is to be used as to which is the best and safest class of construction.

That being the case, it follows that the question whether the construction requirements for a Class I building is a better and safer form of construction for the proposed Jewelers

building than the construction requirements provided for a Class IIa building is a technical question for building experts and engineers to decide rather than lawyers. If there is a conflict in the requirements, it is for your department to determine which is the safest and best form of construction to adopt for the entire building.

We have in this opinion simply endeavored to interpret these ordinances as they are. Your second question, as we have indicated, is more an engineering than a legal question. This department cannot determine which is the best and safest form of construction for a particular building.

Your first question is whether the City Council has in fact confined buildings used to house five or more automobiles exclusively to garage purposes. We do not believe it has. The propriety of permitting other uses in connection with a building used for garage purposes is not for us to determine. It is well recognized that gasoline is a dangerous agent, that fires and explosions originate in garages, that there may be a potential force of danger in the 572 automobiles contained in this combined proposed garage and office building.

If these ordinances, however, as we have interpreted them, are not sufficiently comprehensive, we think it would be well in that event for the experts in the Building Department and the Fire Prevention Bureau to recommend proper changes to the City Council.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Street Railway Companies to Charge Income Tax as Part of Operating Expense.

July 9, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

You have called the attention of this office to the fact that the Chicago Railways Company and the Chicago City Railway Company have for many years past been including in operating expenses moneys paid to the federal government for income taxes, and that such taxes were deducted from the net receipts of the company before the division of the net receipts between the City and the companies was made.

You have also, in a supplemental communication, itemized the federal income taxes paid from the joint accounts of the Chicago Railways Co. and the south side lines for the fiscal years ending January 31, as follows, to wit:

1916	\$ 26,363.12
1917	19,601.75
1918	89,088.47
1919	141,904.48
1920	1,277.46
1921	110,495.17
1922	264,700.15
1923	288,436.16
1924	409,461.26
1925	487,218.78

It is provided in Section 24 of the ordinance passed February 11, 1907, relative to the Chicago City Railway Company, as follows:

“Section 24. On or before the tenth day of April in each year the Company shall come to an accounting and settlement with the said City as of the thirty-first day of January last preceding upon the following basis:

“From the gross receipts of the said street railway system and property from all sources and of every kind

for the year ending on said thirty-first day of January there shall be deducted for such year:

"First: (1) All expenses of operation, including maintenance, repairs and renewals; (2) All amounts contributed during said year and then held in reserve under the provisions of Sections 16 and 18 hereof; (3) All amounts paid out for taxes and assessments levied and imposed upon the real and personal property of the Company, including all capital stock or franchise taxes levied or assessed after the 31st day of January, 1907, but not including any taxes which may by any court be ordered to be levied, assessed or collected after the 31st day of January, 1907, on account of the failure of the Company or any person, firm or corporation owning or having an interest in the said street railways or property, to pay any taxes which should have been paid for or on account of such street railways or property prior to the 31st day of January, 1907, and not including any sums paid by the Company to the City for city license fees, if any, exacted from the Company or its employes. (4) All salaries and expenses of the Board of Supervising Engineers by this ordinance authorized, after the period of 'Immediate Rehabilitation'; and

"Second: A sum equivalent to five (5) per centum per annum for said preceding year upon the amount of the cash purchase price which the said City would then be obligated to pay on account of the items specified in subdivisions 1, 2 and 3 of Section 20 hereof, if it were purchasing the property for municipal operation on such thirty-first day of January, interest being adjusted as to items added to such purchase price during said year. In case in any year the gross receipts shall not be sufficient to pay in full the items in the 'first' and 'second' paragraphs of this section mentioned, then the deficit shall be paid out of the gross receipts of the subsequent year or years."

All of the other ordinances, by virtue of which the other surface car lines are operated in the City of Chicago, contain exactly the same provisions in so far as the deduction of amounts paid out for taxes and assessments levied and imposed upon the real and personal property of the company are concerned. Thus, in the ordinance passed March 30, 1908, relative to the Calumet and South Chicago Railway Com-

pany, the same provisions obtain in Section 22; in the ordinance passed March 15, 1909, relative to the Southern Street Railway Company, the same provision obtains in Section 20; in the ordinance passed February 11, 1907, relative to the Chicago Railways Company, the same provision obtains in Section 25; in the ordinance passed on November 13, 1913, relative to the Chicago Surface Lines, it is provided in Section 3:

“The basis of accounting as between the companies and the City of Chicago which has been in effect for the past period of six years and over, under the 1907 and subsequent traction ordinances, with reference to the renewal, maintenance, operating and other funds, and any other questions of accounting, shall be continued as heretofore, except as the same are expressly or by necessary implication modified by this ordinance, subject to such revision as the Board of Supervising Engineers may from time to time prescribe to carry out the provisions of said ordinances, provided that the distribution in the accounts of the companies of the cost of purchased power shall continue as heretofore * * *.”

Since the items which may be deducted from the joint account before a division is made of the City's share are specifically enumerated in the ordinance, all other items are, by implication, expressly excluded. Therefore, unless the ordinance expressly provides, or provides by strict and necessary implication, that the federal income tax may be deducted, the company has no authority under the contract to deduct it.

That part of the first mentioned ordinance relative to taxes, reads as follows:

“All amounts paid out for taxes and assessments levied and imposed upon the real and personal property of the company, including all capital stock or franchise taxes levied or assessed after the 31st day of January, 1907, but not including any taxes which may by any court be ordered to be levied, assessed or collected after the 31st day of January, 1907, on account of the failure of the company or any person, firm or corporation owning or having an interest in the said street railways or property, to pay any taxes which should have been paid for or

on account of such street railways or property prior to the 31st day of January, 1907, and not including any sums paid by the company to the city for city license fees, if any, exacted from the company or its employees."

The question which arises is whether the federal income tax can be construed to be included within the phrase, "taxes and assessments levied and imposed upon the real and personal property of the company, including all capital stock or franchise taxes levied or assessed after the 31st day of January, 1907."

That the federal income tax is not a tax upon property, is not a franchise or capital stock tax, but is a tax levied primarily upon income, seems clear.

In the case of *Pennsylvania Cement Co. v. Bradley Contracting Co.*, 274 Fed. 1003, the court at page 1006 defined an income tax as follows:

"This necessarily follows from the fact that the *income tax is not upon any specific sum of money, but is a personal tax, measured by sums of money received (or possibly accrued) to the person taxed during a certain period—i. e., the calendar year—and the year 1920 is not expired.*"

In the case of *Alderman v. Wells*, 27 L. R. A. (N. S.) 864, the question was raised of whether a state income tax law was valid, the contention being made that an individual receiving dividends from a corporation which had already been taxed upon the dividends, in that the corporation paid a property tax and franchise tax, could not be taxed by an income tax to include these items.

The court, in holding that such taxation was not double, at page 871 said:

"The next objection to the act is that it results in double taxation. The contention is that plaintiff's income was derived from dividends received upon his stock in corporations chartered and doing business under the laws of the state, and as these corporations had paid taxes on their property, and also on their franchises, a tax on plaintiff's income is double taxation. There is much

room for discussion and difference of opinion as to what really amounts to double taxation, but the weight of authority and reason sustain the taxation of shares of stock in a corporation to the holder thereof, notwithstanding the corporation has paid taxes on its property and also on its franchises. The rents and profits derived from real estate, and the products of the farm, may be taxed, though the land from which they are derived has also been taxed. The profits of a business may be taxed, though the property in the business, bought on credit, has been taxed to the owner, and the debt he owes therefor has been taxed to the creditor, and the property covered by the mortgage may be taxed by the owner, and the mortgage thereon to the mortgagee. Cooley, *Taxation*, 3d Ed., 387, etc.”

In *Levi v. City of Louisville*, 30 S. W. 973-974, 28 L. R. A. 480, an income tax was defined as follows:

“ ‘An income tax’ is a tax which relates to the product or income from property or from other business pursuits.”

In the case of *In re Hazaard’s Estate*, 126 N. E. 345, the court, at page 346, in discussion of the federal income tax, said:

“The tax is against the citizen and resident personally. The owner is taxed with reference to the income.”

In the case of *United States v. Philadelphia B. & W. R. Co.*, 262 Fed. 188, the District Court of Pennsylvania distinguished an income tax from an excise tax as follows:

“We are concerned wholly with the excise tax. Whether it is a scientific and accurate concept of it or not, the concept of it as a charge for the privilege of following an occupation or trade, or the carrying on of a business, gives us a fairly good working idea of what it is. It is, in consequence, an indirect tax, and has no reference to earnings or income, except that the sum of such earnings or income may (as anything may) be made the measure of the tax. *An income tax, on the contrary, is a direct tax imposed upon the thing called income, and is as directly imposed as is a tax on land.*”

According to the distinctions made in the above named cases, it would appear that an income tax is essentially different from a tax imposed upon real or personal property, in that the income tax is levied directly upon income, whereas the other is levied directly upon the appraised value of the real or personal property. That being the case, it necessarily follows, that the federal income tax is not an item which the surface lines, under their respective ordinances, have a right to deduct from the joint account before paying the City's share.

Respectfully submitted,

ALBERT H. VEEDER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Convict Ship as Museum Subject to License.

July 11, 1925.

HON. W. J. CONNORS, Supt. Department of Licenses.

Dear Sir:

We have your communication of May 15, 1925, wishing to know whether or not you should insist that Captain Smith procure an amusement license for the Australian convict ship "Success" now docked at the State street bridge.

Our ordinance on this subject taken from the 1922 Code, Chapter VIII, Amusements, Article I, is as follows:

"176. CLASSIFICATION FOR LICENSE.) All theatricals, shows and amusements offered, operated, presented or exhibited for gain, or for admission to which the public is required to pay a fee, are hereby divided into the twenty-two classes hereinafter designated. Such theat-

ricals, shows and amusements are, for the purpose of this chapter, hereinafter referred to by the general term 'entertainments,' and the theater, opera house, auditorium, hall, park, grounds, gardens, tent or other enclosure within which it is intended to produce, offer or present any such entertainments, for the purpose of this chapter, is hereinafter referred to by the general term 'place.'

2d Class. All lectures, readings or recitations, exhibits of paintings, stereopticon views, living pictures, panoramas, museums, panopticons, exhibits of statuary and of art, and electrical and mechanical shows.

177. LICENSE REQUIRED.) No person, firm or corporation, either as owner, lessee, manager, officer or agent, shall give, conduct, produce, present or offer for gain or profit any of the entertainments as specified in the preceding section without first having obtained a license therefor."

It would seem that this ship "Success," above referred to, is a British vessel duly enrolled and licensed by its government. Its home port is Melbourne, Australia. Said vessel goes from port to port to exhibit the vessel itself, and charges at this Chicago port, an admission fee of 50 cents for each person for the privilege of viewing its peculiarities incidental to an ancient prison ship. It has a license from the U. S. government allowing it to navigate the waters of the United States and to engage in trade and commerce.

There is no question, as has been repeatedly decided by our federal courts, but that the Chicago river is a navigable stream and under the jurisdiction and control of the federal government. It is equally true that the federal government has exclusive control of interstate and foreign commerce.

The United States Constitution, in enumerating the powers of Congress, provides in Article I, Sec. 8, Subd. 3, as follows:

"The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

"Sec. 10, Subd. 2. No State shall, without the consent of the Congress, lay any imposts or duties on im-

ports or exports, except what may be absolutely necessary for executing its inspection laws.

“Sec. 10, Subd. 3. No State shall without the consent of Congress, lay any duty of tonnage. * * *”

In the case of *Harmon v. Chicago*, 147 U. S., page 396, the City of Chicago imposed a license tax for the privilege of navigating the Chicago river, upon steam tugs, licensed by the United States. In declaring this ordinance void the Supreme Court said (page 407) :

“This ordinance is plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign.”

“Waters navigable in themselves in the state, and connecting with other navigable waters so as to form a waterway to other states or foreign nations, can not be obstructed or impeded so as to impair, defeat or place any burden upon the right to their navigation granted by Congress. Such right the defendant had from the fact that their steam barges and two boats were enrolled and licensed as stated under the laws of the United States” (p. 411).

From our examination of other authorities we come to the conclusion that the City of Chicago has no right to collect amusement license from the ship “Success.”

This does not imply, however, that our Harbor Master has not absolute power to regulate the ship’s whereabouts in the Chicago harbor and river.

Yours truly,

FRANK HUENING,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Lay-off of Employees on Account of Lack of Funds.

July 11, 1925.

CARMEN VACCO, Esq., Inspector, Dept. of Weights and Measures.

Dear Sir:

You ask for an opinion as to whether or not you have power to lay off "each and every member of (your) department" for a period of eighteen days for lack of funds and to meet the threatened deficit in the City treasury for the year 1925.

The portion of the Civil Service Act which applies to the removal and suspension of civil service employees is Section 12. That section provides that:

"Sec. 12. REMOVALS. No officer or employe in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. * * *"

In *Fitzsimmons v. O'Neil*, 214 Ill. 494, it was held that this Section 12 of the Civil Service Act, providing that no employe in the classified service shall be removed except for cause, upon written charges, etc., does not apply to removal from office consequent upon the abolishment of the office, if it is in good faith and in the interest of economy. This principle

was also applied to the suspension of a civil service employee and it was held that :

“Under section 12 of the City Civil Service Act a head of a department in a city has power, acting in good faith, to lay off his subordinates for a period of not exceeding thirty days because of lack of work, lack of funds or other good cause.”

Thomas v. City of Chicago, 273 Ill. 479.

The *Thomas* case is clearly in point on the proposition involved in your inquiry. In the opinion the Supreme Court says :

“The language of section 12 is explicit and unambiguous. It provides squarely that ‘nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days.’ It is contended by counsel for the appellant that this provision only refers to suspensions for cause, as enumerated in that section, and was clearly inserted for the purpose of enabling the head of a department to maintain necessary discipline and efficient service by temporarily suspending an employee pending an investigation of charges against him or while his case was being considered. While undoubtedly, the head of the department would necessarily have the power to suspend a subordinate for these causes if the head of a department were to have any control over such subordinate or anything to say about the management of his department, there are a great many causes, other than those given by counsel for appellant, which might make a suspension or lay-off of the employees of a department necessary. Can it reasonably be said, under the clear and explicit language of the statute, that the head of the department has not the power to lay off employees under him for periods of less than thirty days for lack of work, lack of funds or other good cause? The Appellate Court has made a finding of fact that the action of the head of the department was taken in good faith and in the interest of economy and necessary retrenchment and with no intent to circumvent or evade any provision of the Civil Service law, and this finding of fact is conclusive on this court. A different question would be presented if it appeared that the plaintiff had been suspended or laid off for the purpose of evading the provisions of the Civil Service law. In *Fitz-*

simmons v. O'Neill, 214 Ill. 494, we held that section 12 of the Civil Service act, providing that no employee in the classified service shall be removed except for cause, upon written charges, etc., does not apply to removal from office consequent upon the abolishment of the office if it is in good faith and in the interest of economy, and we think the same principle should be applied in the case at bar. We are obliged to assume from the finding of facts that the head of the department of health was obliged, in the interest of economy and because of lack of funds, to reduce the force of sanitary inspectors under him, and did so in such a manner as in his judgment the best interests of the city required."

Not only is the power thus expressly recognized in the head of the department to lay off his subordinates, but the court in its opinion recites the facts and conditions upon which such exercise of power was sustained. This part of the Supreme Court's opinion in the *Thomas* case is instructive as to how and when such power may be legally justified and we therefore quote it here:

"There is no dispute about the facts. It appears that it became necessary during the year 1912 to cut down the expenses of all departments of the city on account of an unexpected shrinkage in the revenues. There were forty-three sanitary inspectors, including the plaintiff. The plaintiff, by reason of the date of his appointment and length of service was the ninth in order of appointment. The head of his department, in order to accomplish the necessary saving in that department, found it would be necessary to lay off approximately one-third of these inspectors. Instead, however, of laying off those last appointed, as required by section 7 of rule 8 above set out if said rule had been followed, the head of the department laid off the last seven who had been appointed, thirty-one days during October. Of the remaining thirty-six in the department, about one-third were laid off during the month of November, one-third during November and December, and the remaining one-third during portions of December and January,—all for periods aggregating twenty-nine days. It further appears that the force of sanitary inspectors was distributed, when all were working by districts, so the entire city would be covered and all classes of business and places necessary to be

inspected would be inspected, and the head of the department laid off the inspectors in such a manner that no part of the city was entirely neglected but a reduced force worked in each district."

It was also held that the seniority rule (now Section 1 of Rule IX) of the Civil Service Commission "does not apply to a suspension or lay-off not exceeding thirty days, when such suspension or lay-off is made in good faith and because of lack of funds, as was done in this case."

Heads of departments may suspend subordinates in the manner and under the conditions set forth in the foregoing opinion of the Supreme Court.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Permits for Construction of Additional Elevated Railroad Tracks Across City Street.

July 11, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your communication of June 29th in which you ask for our opinion concerning the right and duty of the Commissioner of Public Works to issue certain permits to the Chicago, Burlington & Quincy Railroad Company for the construction of two additional elevated tracks across South Kostner avenue. In order that the company's request for such permits and the nature of the legal rights of the com-

pany and the City, respectively, may be entirely clear, we deem it desirable to review the historical facts relative to the incorporation and construction of said railroad, the opening of South Kostner avenue, and the elevation of the road-bed and tracks at the intersection of the railroad and said street.

The Chicago, Burlington & Quincy Railroad Company was originally incorporated in Illinois on February 2, 1849, under the name of the Aurora Branch Railroad Company, which name was changed to the Chicago & Aurora Railroad Company on June 22, 1852, and to the present name on February 14, 1855. The first ordinance granting to said company the right to lay down and maintain tracks and to operate a railroad along or across streets, alleys and public ways in the City of Chicago was passed on December 15, 1862. Since that time numerous other ordinances have been passed granting to said company the right to operate its railroad along or across public ways in certain portions of the south and west divisions of the city, but none of said ordinances, except the track elevation ordinance of January 24, 1898, and the amendment thereto of March 27, 1905, both hereinafter discussed, had or have anything to do with the place at which the right-of-way and tracks of said railroad company intersect South Kostner avenue (formerly South 44th avenue).

The territory which includes the above named intersection and which was formerly known as Crawford was annexed to the City of Chicago on April 29, 1889. South Kostner avenue, then known as South 44th avenue, was opened for public use across the right-of-way of the railroad on May 27, 1903. The company had, however, obtained its right-of-way and completed construction of its railroad at grade from Chicago to Aurora, Illinois, prior to the year 1865. At the time therefore when the railroad was first constructed there existed no such street as South Kostner avenue and the place where said street is now intersected by the railroad was in the country, had not been annexed to the City of Chicago and was not in any incorporated town or village.

On January 24, 1898, the City Council passed an ordinance requiring, directing and permitting the Chicago, Burlington & Quincy Railroad Company and other railroad companies to elevate the plane of their tracks and roadbeds and to eliminate grade crossings as in and by said ordinance provided. That ordinance was accepted in writing by the Chicago, Burlington & Quincy Railroad Company, and its tracks and roadbeds were elevated in substantial accordance with the terms of said ordinance and the amendment thereto passed by the City Council on March 27, 1905. Said ordinance and the aforesaid amendment constitute the only ordinances of the City which deal directly with the respective rights of the City and the railroad company in respect to said intersection of the railroad and South Kostner avenue. Said ordinance made provision for a subway, eighty feet in width, under the proposed elevated railroad, but inasmuch as no such street had been opened at that time it was provided that the subway should not be constructed until the City should have obtained and opened to public use, a street, eighty feet in width, for the distance of at least one-half mile on either side of said railroad.

When, however, said street was dedicated in 1903 it was only thirty-three feet in width. The City Council therefore passed the ordinance of March 27, 1905, which changed the width of the subway to forty feet and provided for immediate construction thereof, coincident with the company's general work of track elevation which was then in progress. This amendatory ordinance neither increased nor diminished the general rights of the railroad company as theretofore fixed by said company's acquisition of title to its right-of-way, by the track elevation ordinance of January 24, 1898, and by the opening of said street across the railroad right-of-way in 1903. It merely altered the specifications and removed the conditions relating to the construction of the subway.

Elevation of the company's roadbed and tracks in accordance with the ordinance of January 24, 1898, as amended by the ordinance of March 27, 1905, was completed sometime in 1906. Four main tracks were constructed across said South

Kostner avenue on steel bridges laid on abutments of masonry and supported by pillars placed in the curb lines of said street. The company now wishes to construct another such bridge across the street and to lay thereon two lead tracks or industry tracks connecting with existing lead track at a point east of said street and with various industrial establishments west of said street. The elevated roadbed of the railroad is wide enough for the laying of these new tracks and the original bridge abutments extend beyond the existing tracks a sufficient distance to provide for such tracks, but a new steel superstructure must be placed across the street to carry the new tracks and new supporting columns now be placed on the curb lines of the street.

The ordinance of January 24, 1898, provided that plans and specifications for all construction work done thereunder should be submitted to and approved by the Commissioner of Public Works and that all such work should be done under his supervision and in accordance with permits issued by him. Said ordinance, however, made no provision for the construction of additional tracks from time to time across any of the public streets nor for the widening of viaducts or bridges at the subways provided for in said ordinance nor for otherwise developing the company's right-of-way with new tracks and structures when the company might deem the same necessary or expedient in the conduct of its business. The question therefore is, "Has the Commissioner of Public Works lawful authority, at this time, to approve plans and issue permits for the construction of such additional tracks, superstructures and columns as the company now wishes to build." We are of the opinion that the Commissioner of Public Works has no such authority, and that permission to construct such additional tracks must be secured from the City Council by an ordinance duly passed.

Section 19 of the Railroad Act provides that railroad companies shall not be authorized to construct any railroad along or across any street in any city, or incorporated town or village, without the assent of the corporation of such city.

town or village. Sub-section 25, Section 1, Article V of the Cities and Villages Act provides that the City Council shall have power to provide for and change the location, grade and crossing of any railroad. Authority for the construction of any railroad track or tracks across the streets, alleys and public ways in the City must therefore be found in ordinances passed by the City Council. The Commissioner of Public Works as an administrative and executive officer is required to supervise and to issue permits for such work as may be authorized by the ordinances of the City, whether general or special, but he is vested with no authority to make an original grant of the right to build any railroad track or tracks along or across any street or public way. In the present instance no ordinance (except the track elevation ordinances above discussed) has ever been passed granting to the railroad company the right to construct, maintain or operate its tracks across said South Kostner avenue. Unless, therefore, the fact that the railroad company acquired its right-of-way and constructed its railroad before said street was opened and before annexation of the place concerned to the City of Chicago gives to the company the right to develop said right-of-way for its own advantage and to build thereon whatever tracks, spurs or switches it may deem expedient or proper, it is clear that no additional tracks can be built across said street without authority from the City Council and that no basis can be found in existing ordinances for the issuance of any permit or the approval of any plans therefor by the Commissioner of Public Works.

In *The Chicago Terminal Transfer Railroad Company v. Chicago*, 220 Ill. 310, the court, in dismissing a petition for a writ of *mandamus* to compel the City of Chicago to permit said railroad company to construct an additional railroad track across 79th, 80th and 81st streets, stated the law as follows concerning the authority of cities over the use of their public streets by railroad companies (p. 314):

“Incorporated cities and villages have full and exclusive authority to grant or refuse permission to construct railroads in or across streets within the limits of

the municipality, and the appellant company has no right or power to construct its tracks across the streets of the appellee city except in pursuance of an ordinance granting such right. The assent of the city to the laying of the track of a railroad along or upon a public street in the city is a condition precedent to the right of the company to so construct its railroad, and until that consent is obtained the railroad company is without right or power so to enter upon or occupy the street. And the power or privilege may, when granted, be restricted by such reasonable conditions as the municipality may see fit to impose."

In *Pittsburg, Fort Wayne and Chicago Railway Company v. Chicago*, 159 Ill. 369, the railroad company sought to enjoin the city from interfering with the construction, maintenance and operation of a switch track across 75th street and Greenwood avenue. The railroad had been constructed before the territory in question had been annexed to the City, and said streets had been subsequently opened across the railroad. The question in the case was, whether the railroad company had the right to construct its switch track across said streets without first obtaining a permit from the City, issued in accordance with the terms of an ordinance authorizing such permit. The court, in dismissing the company's petition, discussed the respective rights of the City and the railroad company as follows (pp. 374, 375) :

"Counsel for appellants state the question for decision to be, can the city of Chicago, under its power (city charter, sec. 63, clauses 9, 25 : 1 Starr & Curtis, 463, 465 ;) to lay out streets, regulate the use thereof, and to provide for a change of location, grade and crossings of any railroad, lay out a street over appellants' railroad and right of way, and, thereafter prevent the appellants from constructing a necessary railway track through such street, within the limits of the right of way, until appellants shall have a special ordinance from the common council of the city so to do. The argument in support of the negative of this proposition seems to attach importance to the fact that in this case, when the railroad was built, no municipality existed where the streets in question are located.

It has been repeatedly held by this court that every railroad company in the State holds its right of way subject to the right of the public to have highways and streets extended across the same. No reason is or can be shown why this right in the public is limited to municipalities existing at the time of the locating and construction of the road. The very reason why the right of a railroad company to the use of its right of way is subordinated to that of the public to extend highways and streets across it, is that otherwise the chartered right of the railroad company to acquire a right of way and construct its road through the State would deprive the people generally of their right to travel and transact business by their own means of conveyance and transportation. Does this reason exist in the laws because the public necessity arises after the right of way is located? Certainly not. And we think it too clear to be controverted, that when, as in this case, the village of Hyde Park located Seventy-fifth street and Greenwood avenue, the rights of the public and the railroad company became precisely the same as they would have been if the village had been organized, or even the streets laid out, before the right of way was established and the road built. In the case of extending a street across a right of way, the joint rights of the parties were stated in *Chicago and Northwestern Railway Co. v. Chicago*, 151 Ill. 348, to be 'the same, and subject to the same restrictions and limitations as such rights are enjoyed at the crossings of public streets by railways.' That is to say, whether the street or railroad is located first makes no difference—the rights of the public and of the railroad company are the same. Whether the municipality which extended or located the street existed when the right of way was acquired or not, can, as we think, be of no possible consequence. The crossing being legally established by the authorities of Hyde Park, it became subject to control under all ordinances lawfully in force in the city of Chicago at the time of the annexation."

To the same effect that railroad companies cannot construct additional tracks across public streets without ordinance authority therefor, are *People v. South Park Commissioners*, 221 Ill. 522, and *Village of LaGrange v. Indiana Harbor Belt Railroad Company*, 204 Ill. App. 457. The somewhat different language used by the court in *Chicago and*

North Western Railway Company v. Town of Cicero, 157 Ill. 48, and *Chicago and North Western Railway Company v. Chicago*, 151 Ill. 348, concerning the right of a railroad company to construct additional tracks on its right-of-way after the City had condemned a portion of such right-of-way for a street crossing related merely to the ownership of the land constituting the right-of-way. Said cases involved the measure of damages to be allowed in condemnation cases and held that the City condemned only an easement of way and that the company retains ownership of its right-of-way for all other purposes subject to the right of the public to a street crossing. The right to build additional tracks, which is therein upheld, is entirely consistent with the requirements for ordinance permission for the laying down of such additional tracks across public streets, even when such streets have been open to the public after the railroad company obtained title to its right-of-way and constructed its railroad.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Reinstatement of Library Employee Who Is on Pension Roll.

July 14, 1925.

HON. HARRY G. WILSON, Secretary, Chicago Public Library.

Dear Sir:

We are submitting our opinion on the legality of the proposed reinstatement of Miss Nellie E. Doran to her for-

mer position in the Chicago Public Library. Accompanying your request, which is made in behalf of the Board of Directors of the library, is the written request of Miss Doran for reinstatement directed to the Civil Service Commission.

From your statement and that of Miss Doran it appears that she was a Civil Service employee of the library from February 14, 1891, till June 11, 1922, at which time she asked and was granted a leave of absence for a year; that this was extended to June 24, 1924, at which time, being unable to return to her position, she tendered her resignation, which was duly accepted and filed, and at the same time she petitioned the board for a pension, which was granted in the sum of \$72.50 per month; that Miss Doran has ever since regularly received and accepted payment of such pension and continues to maintain her status as such pensioner.

You state that "the two points on which your opinion is respectfully asked are

"1. Under the rules of the Civil Service Commission can a resignation be withdrawn after a lapse of a year from the time the resignation is accepted?

"2. What would be Miss Doran's status in connection with the Public Library Employees' Pension Fund?"

In our opinion No. 1050, dated July 7, 1925, directed to W. F. Foehringer, Secretary of the Civil Service Commission, in a case analogous in its facts to this case, we held that such resignation could not be regularly and legally withdrawn.

Sec. 2 of Rule IX provides that "the Commission may permit the withdrawal of a resignation and its cancellation upon application at any time within thirty days after the filing of the same, provided the head of the department concerned approves of such withdrawal and cancellation." In this case there is neither application by Miss Doran nor approval thereof by the Library Board within the thirty days prescribed by the rule.

Sec. 3 of Rule VIII provides that "no leave of absence shall exceed one year, except it be * * * because of disability or injury received in the performance of duty, and in

such cases leave of absence may be extended beyond one year, with the approval of the Commission." Miss Doran's leave of absence was for a period of two years, at the expiration of which she did not ask for an extension, but instead filed her resignation. It would constitute a specific violation of this rule to permit the withdrawal of the resignation and to reinstate the applicant after this absence of three years.

Your second question must be answered by the statement that one cannot at the same time be a pensioner in the civil service and be regularly employed in that service. To become a pensioner one must have terminated the status of employe in the civil service, and the fact that Miss Doran maintains her status as a pensioner of the Public Library Employes' Pension Fund also makes impossible the approval of her application for withdrawal of her resignation and precludes her reinstatement in her former position.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Emergency Health Appropriations After July 1st.

July 15, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We are in receipt of your letter of this date in which you ask whether the power of the City Council to make appropriations will permit you to comply with the requests of the Commissioner of Health as embodied in the letter setting forth his needs which you attached to your communication.

We beg to advise you that after the first of July each year the City Council may make transfers of funds within the department, but it has no power to make new appropriations which have not been sanctioned by a majority of the legal voters by petition or at an election, except as provided for in Section 3 of Article VII of the Cities and Villages Act.

In the section just referred to appears a proviso which reads as follows:

“provided, however, that nothing herein contained shall prevent the city council or board of trustees from, by a two-thirds vote, making additional appropriations for the purpose of making any improvement or restorations, the necessity for which is caused by any casualty or accident happening after such annual appropriation is made, nor from making expenditures nor incurring liabilities necessary to meet any emergency created by epidemic, happening after and unforeseen at the time of making the annual appropriation, nor from making appropriations necessary to care for such expenditures and liabilities.”

It will be seen from the above that in order to authorize an appropriation for expenditures, even though based on an emergency created by an epidemic, the City Council is limited to cases where the epidemic occurs after the making of the annual appropriations, and which could not have been foreseen at the time of making them.

From the nature of the letter of the Commissioner of Health which you submitted, it would appear to us that the conditions described by the Commissioner of Health are not in the nature of the emergency for which such appropriations can be made at this time.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Exemption of Water Rates for Church When Part of Its Premises Are Rented Out.

July 16, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have before us your letter of July 10, 1925, addressed to the Corporation Counsel, in relation to the claims of the Congregation Anshe Morov Meesach Sford, 1528 South Sawyer avenue, for exemption from water rates under Section 4128 of The Chicago Municipal Code of 1922.

The portion of the ordinance in question which is to be interpreted reads as follows:

“The commissioner of public works may exempt from the payment of water rates property herein enumerated as follows:

(a) Such property as is used in the immediate conduct or carrying out of the purposes of any charitable, religious or educational institution, if application be made for such exemption to the commissioner of public works in the form prescribed by him, and if it shall appear to the satisfaction of said commissioner that such property is not used for gain or profit, or rented, conducted, operated or maintained for the purpose of producing revenue. As a pre-requisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institution. Nothing contained in this paragraph shall be held to exempt property of the United States of America, of the State of Illinois, or of any of its political subdivisions except as hereinafter mentioned.”

The information obtained by the field assessor of water rates is to the effect that the basement is occupied as a tailor shop, and that the tenant pays \$15 per month.

In the case of *People ex rel. C. C. Baldwin, County Collector, appellee v. The Jessamine Withers Home, appellant*,

312 Ill., p. 136, opinion filed April 14, 1924, our Supreme Court quotes with its approval the case of the *First M. E. Church v. City of Chicago*, 26 Ill. 482, which is as follows:

“A building consisting of four stories and basement was erected on a lot owned by the church. The lower stories and basement were occupied and used for business purposes and rented to different persons, the entire rent and income being applied exclusively to the purposes of the church, while the upper stories were exclusively used for the religious purposes of the church. The church objected to a judgment for taxes against the property, and it was argued, on appeal, that because the rents and profits received for the use of the building were applied to the payment of the mortgage on the premises and to provide other places of worship in Chicago, this was not appropriating the building to a pecuniary profit but exclusively to religious purposes. In the opinion it was said that the same might be said of a manufacturing establishment the proceeds of which were devoted to the same object. It was held that the meaning of the law as applied to religious buildings and furniture was, that they must be used directly for sacred and not for secular purposes. It was not enough that the profits or income of the secular uses are to be applied to sacred purposes. When money is made by the use of the building, that is profit, no matter to what purpose that money is applied.”

From the foregoing we are of the opinion that you would not be justified in remitting the charges for water supplied to this property.

Respectfully submitted,

THOMAS W. FLYNN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Licenses for Second-hand Automobile Dealers.

July 17, 1925.

WILLIAM J. CONNORS, Esq., Superintendent, Department of License.

Dear Sir:

We have before us your letter of recent date in which you ask how you should treat automobile dealers having the agency for one or more automobiles who take in trade old automobiles and then maintain a separate space and special sales department for the second-hand cars.

We take it from your letter that the question you ask does not apply to persons whose business is dealing in second-hand cars who have no sales agencies for new cars. In such case there can be no question about the status of the dealer, since he is purely and simply a second-hand dealer, operating a second-hand store as defined by Section 3491 of The Chicago Municipal Code of 1922.

We assume also that your inquiry does not extend to dealers in new automobiles whose business in second-hand cars is purely incidental to the main business of selling new cars. In such cases, while the law is not as well settled as it might be, we have allowed ourselves to be guided by the view expressed in such cases as *City of Chicago v. Reinschreiber*, 121 Ill. App. 114, where the court said:

“In the most literal sense it would be a misuse of terms to call a place of business a second-hand store where the dealing in second-hand material is merely an incident of the business, not an essential part of it, nor its principal purpose.”

It is more difficult to determine the status of the kind of places you ask us about, because there may be such a

thing as running a place that is only maintained as an incidental part of the main business and yet not under the same roof or in the same enclosure. We have no doubt that it will be contended, in every case where any kind of business in new automobiles is done, that the second-hand business is merely incidental to it, no matter what proportion of the whole business it represents.

We are unable to give you a precise rule or definition that will fit every case, but we believe you will be within your rights if you insist that parties who occupy premises entirely distinct from their new car salesroom and not directly connected with it, who actually deal directly with the public from there, or who display signs on the second-hand sales place indicating that they will deal directly with the public from there, should be licensed as second-hand dealers.

To make ourselves more clear on the point at issue, if the place where the second-hand cars are kept is more in the nature of a storeroom, while the business is transacted at the new automobile salesroom, then you would be justified in treating the second-hand place as incidental to the main business carried on elsewhere. But if the parties buy and sell at the second-hand place, or do either buying or selling there, or invite the public in by signs or displays which are calculated to make the public believe they can buy or sell in such place, you should insist on the enforcement of the second-hand store ordinance.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Inspection of Scales for Free Weighing.

July 18, 1925.

HON. CARMEN VACCO, Inspector of Weights and Measures.

Dear Sir :

We have received your letter with reference to the so-called "Free Weighing Machines" which are located at various places where the public may step on such a scale and obtain the indicated weight without dropping a coin in the slot or otherwise paying for the service.

It appears that you have been testing these scales and charging the fees prescribed by Section 4176 of The Chicago Municipal Code of 1922, but that a protest has been made on the alleged ground that you are not authorized to charge for testing them. You state also that the party making the protest is asking for a refund of the fees already paid.

The City of Chicago has ample statutory authority for such inspection and charge. We do not think this can be seriously questioned. (See Clause 55 of Section 1, Article V, Cities and Villages Act; also Sections, 7, 8, 9, 10, 12, 13 and 14 of Weights and Measures Act.) Therefore, the only basis for the contention of the objecting party, so far as we can see, must be a misunderstanding of the meaning and purport of Section 4179 of the code.

The section in question reads as follows:

"4179. INSPECTION OBLIGATORY.) Every person using weights, measures, scale beams, patent balances, steelyards, or any instrument, in weighing or measuring any article intended to be purchased or sold in the city, or any article weighed or measured for shipping or receiving purposes, or in weighing or measuring any person or animal for hire or reward, shall cause the same to be inspected and sealed by the inspector of weights and measures in accordance with the provisions of this chapter."

As we understand the above section, it imposes a duty on the person using scales for purposes of weighing articles purchased or sold, or for shipping or receiving purposes, or for weighing persons or animals for hire or reward, to have his scales inspected and sealed. In such cases a person using scales that do not weigh properly may be prosecuted for failure to have such inspection made. This section, however, does not limit the authority of the inspector of weights and measures, who may inspect and seal such scales even though they may never be used for anything but free weighing. In fact, as we read Sections 4169 and 4173 of the code, the duty is imposed on the Inspector of Weights and Measures to inspect and seal *all* scales.

In our opinion, therefore, you were following out the line of your duty in making the inspections in question and charging fees therefor.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Retirement of Employees of Fire Department.

July 22, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We are in receipt of your letter of the 17th inst., in which you inform us that you are following out the advice given you some time ago with reference to the retirement of permanently disabled employees. You state therein that, in

addition to those who are reported as permanently disabled, there are many who have been off for periods of more than three months with full pay of whom there has been no recent examination by the City Physician, that you have ordered all these to report to the City Physician, and in case the report shows that they are permanently disabled they will be treated in the same way as those first above mentioned.

You ask our advice as to what course to pursue in the case of those who fail to report to the City Physician, and you mention particularly the case of Mr. Patrick Rogers, chief of the 14th battalion.

As to all whom you order to report to the City Physician, if they are physically able to so report it is their duty to do so. In case they fail to do it and have no excuse (such as physical inability, etc.) for not doing it, they are guilty of insubordination, and charges may be preferred against them.

With respect to the case specifically mentioned, we note that Mr. Rogers was examined in April, and that the City Physician at that time reported that he had an affection of the gums and was unable to say when Rogers would return to duty; also that on June 26th Rogers was notified to report for duty, and that his sick leave was canceled, to which he replied that if his name was taken from the pay roll he would recover from the bondsmen of the Fire Commissioner; and finally, when notified that his sick leave was canceled as of July 15th and he must either report for duty or report to the City Physician preparatory to making application for pension, he made no reply whatever. He has been absent since December 28, 1924. The ailment from which he was suffering does not appear to be of a character that was an injury resulting from the performance of his duties as a fireman.

The proper procedure in such a case is to prefer charges. Merely dropping the name from the pay roll will ordinarily precipitate litigation to determine the question as to whether

a civil service employe can be dismissed without the formality of preferring charges and a hearing thereon. As a matter of law, if an employe is ordered back to work and fails to go to work he has no claim on the City, but the experience of the past demonstrates that it is sometimes difficult to establish the facts in a case of this kind.

We therefore beg to advise you that the best method for you to proceed is to suspend this employe and prefer charges against him, at the same time notifying the Comptroller that he is absent without permission and without pay, in order that it may appear of record that the statutory 30-day suspension is not the limit of the period for which pay may be withheld.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Fees for Inspection of Hotels.

July 23, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

We have before us your letter of recent date in which you speak of the fact that Sections 2148 to 2151 of The Chicago Municipal Code of 1922 are not being enforced because the legality of said sections has been questioned. These sections relate to the annual inspection of hotels and rooming houses, and provide that an inspection fee fixed therein shall be paid in advance by the owners or operators thereof. You

ask for an opinion as to whether such fees for inspections can be legally collected.

It was held by our Supreme Court, in the case of *City of Chicago v. M. & M. Hotel Co.*, 248 Ill. 264, that the City had no power to license or regulate hotels. The ordinance under which suit was brought in that case was published in full in that opinion, and it contains no feature which is referable to the powers of the City in relation to health, and no mention of the health clause of the statute is made in the opinion.

A somewhat similar decision is the case of *Arms v. City of Chicago*, 314 Ill. 316. In that case the court decided that there was no power granted to the City to license electricians or to charge fees for electrical inspection. The logical interpretation of this decision would seem to indicate that where the power to license or regulate is not granted there is no power in the municipality to control the business in any way. But in applying the decisions just cited to the health clause, we find that they do not affect that, and by other decisions which we speak of below the Supreme Court has drawn a distinction between such exercises of power and those referable to the health clause. This distinguishing line is even traceable in the case of *Potson v. City of Chicago*, 304 Ill. 222, where it was held that the City had no power to license restaurants, but where reliance was placed on Clauses 41, 50, 53 and 91 of Section 1 of Article V of the Cities and Villages Act, and the health clause (78th) was not even mentioned.

On the other hand, we find that whenever an ordinance providing for a license or for other regulation is based on the health clause and there is reasonable cause for enacting it for purposes of sanitation, or its enforcement tends to the promotion of the public health, the Supreme Court sustains the exercise of the power.

Thus, it was held in *Gundling v. City of Chicago*, 176 Ill. 340, that cigarette dealers may be licensed, and the court

based its decision squarely on the health clause. The same is true of *City of Chicago v. Drogasawacz*, 256 Ill. 34, where the bakery license was sustained, and the case of *Koy v. City of Chicago*, 263 Ill. 122, in which the court upheld the milk dealers' license. But lest it be pointed out that in each of these cases, in spite of the opinion of the court being predicated on the health clause, there were other clauses which had some relation to the subject-matter, we point to the case of *Moy v. City of Chicago*, 309 Ill. 242, where it was expressly held that the licensing of the laundry in that case is based on the health clause alone. The language of the court is as follows:

“Appellants argue that the ordinance is passed pursuant to the eighty-second paragraph of Section 1 of Article 5 of the Cities and Villages Act. (Laws of 1919, p. 285.) This paragraph was declared void in *People v. Kaul*, 302 Ill. 317. If the ordinance depended upon this paragraph for its validity it could not stand. The ordinance is clearly a health regulation, and the city had authority, under paragraph 78 of the same section, to pass the ordinance. That paragraph provides that the City shall have power ‘to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.’ This clause gives the City the power to compel any owner or occupant of a building to keep it in a sanitary condition and to conduct his business so that it will not endanger the health of the employes or of the public.”

In view of the manifest intention of the Supreme Court to uphold reasonable ordinances which are based on the health clause, we believe the sections mentioned above will stand if you are prepared to show that their enforcement will tend to promote the public health. There must, of course, be a real inspection of the rooms for which fees are charged—otherwise the courts will hold that under the guise of inspection we are imposing a license fee that has no purpose except the raising of revenue.

We recommend that an attempt be made to enforce the provision of Sections 2148-2151 of the code, and if litiga-

tion results we will endeavor to sustain the validity of the sections in question.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Release of Prisoners from House of Correction.

July 24, 1925.

RICHEY V. GRAHAM, Esq., Superintendent, House of Correction.

Dear Sir:

Your letter, concerning the issuance of releases by judges of the Municipal Court for men sentenced to the House of Correction, was referred to the undersigned for consideration and reply. It appears from your letter that you are not refusing paupers' petitions, but that you are refusing to honor court orders where a party has been duly convicted and sent to the institution and no subsequent proceedings were had on which a writ was issued directed to you, such as paupers' petitions, habeas corpus proceedings, etc.

The question raised by you is not a new one and is difficult for several reasons which we will explain in this opinion. The answer to it hinges on the determination of whether the rule applicable in the case of crimes and misdemeanors applies in the case of judgments for violations of municipal ordinances.

In the case of commitments for crime and misdemeanors the court loses jurisdiction when the defendant has been sentenced and committed to the custody of the proper offi-

cer of the penal institution. This rule applies to the Municipal Court as well as to all other courts (see *People v. Turney*, 273 Ill. 546; *People v. Whitman*, 277 Ill. 408; *People v. LaBuy*, 285 Ill. 141.)

Whether the same rule applies in the case of commitments for violations of City ordinances has not been passed on by our Supreme Court, and we can get little light on this subject from decisions in other states, because the rule as to whether such proceedings are criminal or civil is different in different jurisdictions. Our courts have repeatedly held that prosecutions for violations of City ordinances are civil proceedings. They do not lose the character of civil proceedings even where the defendant is brought into court on a warrant (*City of Chicago v. Williams*, 254 Ill. 360.) Nevertheless, we doubt whether the mere fact that the proceeding is civil in its nature is the point on which the final answer to the question you ask turns.

The law gives the criminal courts the same jurisdiction over their final orders as is given to the civil courts. If a motion is entered before the end of the term in a criminal court for the purpose of vacating the final judgment it may be continued from term to term and the court does not lose jurisdiction. The same is true with regard to a motion to vacate a final order in the Municipal Court within thirty days after its entry. It makes no difference that the judgment was in a case involving a crime or misdemeanor. But when the sentence is once begun by the delivery of the defendant to the proper custodian of his person there is no opening up of the case. So far as we can see, the only reason why this distinction is made between a criminal case and a civil case is that there has been execution of the final order in the criminal case. If that is the basis on which the court holds that it is too late to open up a judgment and that the court has lost jurisdiction, then, in our opinion the same rule will hold with respect to a person who is taken into custody for failure to pay a fine imposed for violation of a City ordinance.

We believe it is of great importance that this question should be authoritatively settled. It will be a case of first impression when it reaches the Supreme Court. Believing as we do, we think it will be advisable to continue to refuse to recognize releases in the future as in the past. This must not be construed by you, however, as advising you to refuse to obey a valid order of court. If any judge issues a writ commanding you to bring the person to court it is your duty to observe it.

In case your position in such matters precipitates litigation we will advise you as to your future actions as soon as you inform us that suit has been begun.

Very truly yours,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Vacation of Holmes' Subdivision.

July 24, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Under date of June 25, 1925, the Superintendent of Maps addressed a letter to this department in which he states that a plat of a new subdivision within Holmes' Subdivision of the N. W. 1/4, 10-37-14, was submitted to him for approval; that the matter involved the validity of the vacation of said Holmes' Subdivision; that an opinion on this had

been rendered by the Corporation Counsel on December 14, 1911; and that the Chicago Title & Trust Company had questioned the soundness of the opinion so rendered, and requested an opportunity of presenting a brief on the question. Such brief has since been presented to the writer.

The property supposed to have been dedicated was the quarter section extending from State street on the west to South Park avenue on the east, and from 95th street on the north to 99th street on the south. The supposed dedication was by plat, recorded October 31, 1874, in Vol. 8 of Plats at page 81. The west $53\frac{1}{3}$ acres of this quarter section is the part lying between State street and Michigan avenue. It is now proposed to make a resubdivision of property which is shown on the plat as between State street and Michigan avenue, and between streets designated as East 96th place and East 98th place. The objectionable feature of the proposed resubdivision is that it cuts out Wabash avenue, but it appears that Wabash avenue north of this tract was vacated by ordinance September 30, 1912 (Council Journal, p. 1852), and south of this tract by ordinance July 10, 1916 (Council Journal, p. 1441).

The opinion called into question was written by former Assistant Corporation Counsel Nicholas Michels.

In passing on this attempted dedication, the Corporation Counsel found certain defects, viz, that the plat was not subscribed by the owner and does not bear his seal and that the certificate of the justice of the peace was deficient. The opinion holds that these defects are fatal to the statutory dedication, but that the filing of the plat constitutes an offer to dedicate. It then goes on to show that there were certain acts done by the City indicating acceptance on the part of the City, and that by such offer and acceptance there was a common law dedication. Also that since there was no statutory dedication there could be no such thing as a statutory vacation of the dedication. Finally, it holds that the City has accepted all the streets and alleys in the subdivision and that the deed purporting to vacate the west

53 1/3 acres is invalid as an attempted statutory vacation, and therefore the streets and alleys can only be vacated in the manner prescribed by Chapter 145 of the Revised Statutes.

As against this, it is shown that on June 9, 1871, the owner of the west 53 1/3 acres conveyed them by trust deed to secure the payment of certain notes; that the trustee did not sign or acknowledge the dedicatory plat, and therefore could not be held to have joined in the offer of dedication; that by foreclosure the title went to the International Bank, and the new owner filed a deed of vacation on April 23, 1879; that therefore the owners of the legal title before and after foreclosure were not bound by the offer of dedication and disavowed it before any common law or prescriptive rights attached.

There are a number of other things that could be mentioned in connection with this matter, but we believe the question of whether or not there was such a dedication as will stand must depend primarily on whether the original offer of dedication was made by parties who had the power to dedicate. The fact that there was a trust deed conveying the premises in question seems to have been entirely ignored by the Corporation Counsel, who was not apprised of any such circumstances but was merely asked whether the dedication was a statutory or common law dedication and whether the deeds of vacation later recorded were sufficient to constitute a vacation. The title of the party purporting to be the owner would not be examined into under such a state of facts, but it would be assumed that he had good title and could dedicate. If examination of the records had been made it would not have been disclosed, because it was an ante-fire instrument.

It seems quite clear a mortgagor has no power to dedicate for public purposes lands that are so mortgaged without some sort of acquiescence on the part of the mortgagee.

People ex rel. Weber v. Herbel, 96 Ill. 384.

City of Alton v. Fishback, 181 Ill. 396.

The mortgagor or trustee does not appear to have assented to the dedication in any way, and the successor of the trustee, after it had acquired the property through foreclosure proceedings, filed its deed of vacation. Whatever the force of this deed in law, it must be regarded as a disavowal of any intention of joining in the offer of dedication. It has especial force in the instant case, because it was done before any of the acts of acceptance on the part of the City.

The only remaining question, therefore, is whether there was such user after the deed of vacation as to give force to the contention that there was a common law dedication of Wabash avenue at the point in question. There has been much pointed out to us concerning the way State street and Michigan avenue were opened, but we can see no reason why these matters should affect Wabash avenue. We do not believe that the fact that State street and Michigan avenue were opened and remained open constituted a common law dedication of the streets in the whole of the west $53\frac{1}{3}$ acres, but whether it was through condemnation or user in the case of those streets, it affected only the streets so condemned or used.

Consequently, although we esteem it to be our duty to the public to exercise the utmost vigilance concerning the surrender of streets or alleys, we are constrained to hold that there was no such dedication or user of Wabash avenue at this point as will enable us to retain the street for the public.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Investment of Monies in Policemen's Annuity and Benefit Fund.

July 25, 1925.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir :

Your letter of recent date makes inquiry concerning the investment of monies belonging to the Policemen's Annuity and Benefit Fund. Under the amendments to the act creating same, which have just taken effect, the City Treasurer is designated as treasurer and custodian of the monies and securities in the fund. The specific question that you ask is whether the Retirement Board may purchase and the treasurer hold securities which are not registered or not registerable.

Under Section 6 of the act before it was amended, the board was given power to invest in interest bearing bonds of the United States, of the State, of any county of the State, or of any city, village, incorporated town, municipal corporation or school district in the State; and it was also given power to invest in any special assessment bonds issued by any city, village or incorporated town under the Local Improvement Act. The act required that any bond purchased by the board should be registered in the name of the annuity and benefit fund.

Under the provisions just mentioned there was no such thing as purchasing securities other than bonds, and it was assumed undoubtedly that all bonds of the kind designated were registerable and therefore were required to be registered. If the question you now ask had been asked concerning the act before amendment, we should have said unhesitatingly that if any of the bonds which could be invested in were not registerable they should not be purchased.

The amended act, however, changes Clause (e) of Section 6 so as to wipe out the authority to invest in special assessment bonds. It adds authority to invest in Federal Farm Loan bonds issued in accordance with the Federal Farm Loan Act, and to invest in tax anticipation warrants issued by the city in which the annuity and benefit fund shall be operating—which means, of course, in tax anticipation warrants of the City of Chicago. Clause (e) then retains the same sentence with respect to registering, which reads as follows:

“Any bond purchased by the said Retirement Board shall be registered in the name of the Annuity and Benefit Fund herein provided for.”

It is obvious that tax anticipation warrants, not being bonds, do not come within the provision just quoted. As to any of the other bonds except Federal Farm Loan bonds, they would have to be registerable in order to be included within the authority to purchase. But with respect to Federal Farm Loan bonds issued in accordance with the Federal Farm Loan Act, if such bonds are not registerable we believe the board still has power to purchase them for investment. Our reason for this is that the provision requiring registration was in the act before and was not amended, while the provision for authority to purchase the Federal Farm Loan bonds was added specifically by amendment. Therefore, if this later provision conflicts with the former it is manifest that it was the intention of the legislature to overcome so much of the provision with regard to registering as conflicts with the provision for purchasing Federal Farm Loans.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Retirement of Permanently Disabled Firemen.

July 25, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

You forwarded to this department a letter of inquiry to which was attached a protest from the Firemen's Association of Chicago. The protest was the result of action taken by you requiring the retirement of men permanently disabled, which action was taken in accordance with an opinion rendered by this department on December 9, 1924. You ask whether there is any point from a legal standpoint to the claim made by the Firemen's Association of Chicago.

The protest above referred to states that a number of men have been called to your office and have been ordered to apply for a pension in spite of the fact that they have not drawn their usual salary for a period of twelve months after being disabled. Your attention is directed therein to Sections 1199 and 1200 of The Chicago Municipal Code of 1922, and it is stated that the Corporation Counsel, in rendering his opinion, failed to take into account said sections. It is further stated that the protesting association has been advised by legal counsel that you, as Fire Commissioner, cannot remove a disabled member of the department from the pay roll within the twelve month period, or order him to report for duty, as long as the City Physician certifies that he is disabled.

With respect to ordering a person to report for duty who is disabled, it is obvious that he cannot be expected to return to duty when he is under such physical disability as to prevent him from doing it. This is not, however, the gist of the matter, since the order to report for duty is merely the formality to determine finally whether or not such per-

son can resume his duties. The real question at issue is what are the rights of such a person if the City Physician reports him as permanently disabled.

This matter was very thoroughly discussed in the opinion of the Corporation Counsel above referred to and we see no reason whatever for receding from the views expressed therein. The two sections of the code which it is said were not touched upon in the opinion are set forth verbatim in the opinion, and it is shown that they are in conflict with the statute. There seems to be no doubt but what the statute contemplates that when a fireman is so incapacitated as to be unable to perform his duties and is pronounced permanently disabled, his retirement from the active service is rendered necessary. The opinion in question leaned towards an interpretation of the statute sufficiently mild to avoid immediate retirement. But that was only because it would be subjecting an injured fireman to rather harsh treatment to immediately require his retirement when he is hurt. Therefore it was indicated that there might be some modification of the ordinance which would have the effect of bringing it reasonably within the terms of the statute. We understand that you are not compelling retirement until these disabled persons have been away fully three months, and therefore you are following out the idea indicated in the opinion to the effect that no harsh rule ought to be applied.

We are compelled to stand, however, on the proposition so clearly set forth in our former opinion, in which we show that the ordinance of the City is in direct conflict with the statute and cannot prevail against the statute.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Regulation of Public Weighmasters.

July 27, 1925.

HON. CARMEN VACCO, Inspector of Weights and Measures.

Dear Sir:

We have your letter of the 13th inst., in which you make inquiry as to the authority vested in your office to regulate public weighmasters. Your letter bears reference to a decision of the Supreme Court relating to the subject-matter, which prompted your seeking an interpretation thereof.

In the case you doubtless have in mind, *City of Chicago v. Kautz*, 313 Ill. 196, the court held that the City is empowered to test scales and provide for the weighing materials by licensed weighmasters, but decided that it was an unreasonable exercise of power to cause loads to be *reweighed* by the Inspector of Weights and Measures upon the presumption that fraud had been committed. With this exception, however, the ordinances in the case referred to and in a prior case (*City of Chicago v. Wisconsin Lime Co.*, 312 Ill. 520) have been declared valid and reasonable.

Wherever ordinances are divisible, and one part thereof is invalid, the courts hold that the valid part remains enforceable. A like proposition is involved in your inquiry. That is to say, your power and authority to regulate public weighmasters and deputies is not curtailed by the *Kautz* decision, except as to the reweighing of loads, as provided in Sections 4188 and 4192A of The Chicago Municipal Code of 1922, which cannot be done. Otherwise your office may continue to function in like manner as heretofore, and as the present ordinances provide.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Vacancy on Board of Trustees of Firemen's Pension Fund by Retirement of Representative of Active Firemen.

July 28, 1925.

HON. AL. F. GORMAN, Secretary, Board of Trustees Firemen's Pension Fund.

Dear Sir:

We are in receipt of your communication of July 20, 1925, in which you inform us that "Mr. Wm. S. Johnson is a member of the Board of Trustees, chosen from the active firemen, in accordance with Section 3 of the Pension Act; that on July 15 he was retired and placed on the pension roll," and you ask us to advise the board as to Mr. Johnson's status as a trustee.

The portion of Section 3 of "An Act to provide for a firemen's pension fund and to create a board of trustees to administer said fund in cities having a population exceeding two hundred thousand (200,000) inhabitants" which is to be interpreted reads as follows:

"Section 3. That in each such city there is hereby created a body politic and corporate, under the name and style of 'The Board of Trustees of the Firemen's Pension Fund of the city of (name),' which shall have exclusive control and management of the Firemen's Pension Fund. Said board shall be composed of the City Treasurer, City Clerk, Marshal or chief officer of the Fire Department and the Comptroller or chief officer of the Finance Department of said city and three other persons who shall be chosen from the active firemen of such city, and one other person who shall be chosen from the firemen who have been duly retired under this act. The members of said board to be chosen from the active firemen shall be elected by ballot at a biennial election, at which election all active firemen of said city shall be entitled to vote; and the members of said board to be chosen from among the firemen who have been duly retired as aforesaid shall be elected by ballot at a biennial election, at which election all firemen retired under this act shall be entitled to vote.

The election or elections in this section provided for, shall be held on the 3d Monday in April, under the Australian ballot system, at such place or places in said city and under such rules and regulations as shall be prescribed by the board: Provided, that no person entitled to vote shall cast more than one vote at such election. In the event of death, resignation, failure or inability to act of any member of said board, elected under the provisions hereof, the successor to such member shall be elected at a special election, which shall be called by said board and shall be conducted in the same manner as the biennial election hereunder."

It will be seen from the above that the law contemplates that the active firemen of the City shall have three representatives on the Board of Trustees and retired firemen should have one representative. If it happens that by reason of resignation or forced retirement one of the representatives of the active firemen becomes a pensioner and is on the retired list, this status is changed, and if he is permitted to continue to serve for the remainder of his term there would be two representatives of the active firemen and two representatives of the retired firemen. While this might not cause any serious friction or disturbance, nevertheless it is not what the law contemplates. We believe that when such a change takes place, the representative who is no longer an active fireman has become disqualified as such representative, and *ipso facto* he is unable to act as the representative of the active firemen. The use of the word "inability" in the statute is not confined to physical inability or such inability as will prevent his acting, but relates likewise to disqualification within the meaning of the statute. We are, therefore, of the opinion that a vacancy was created by the retirement of Mr. Johnson and the election should be called to name his successor.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Closing of Adams Street Bridge to Traffic.

July 28, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

In your letter of the 11th inst. you forwarded to us a communication from Mr. Farwell Winston with reference to damages that might be sustained by tenants of the John V. Farwell Company during the period that the Adams street bridge is closed to traffic on account of the construction of the new bridge. Later there was sent to us copy of a letter written by the attorneys of the Farwell Company in which the same subject-matter is dealt with.

The gist of the complaint made is that the Farwell Company desires reimbursement for losses occasioned by the closing of the bridge. It seems that there is a provision in one of the Farwell leases which entitles the tenant to remain in possession without payment of rent during the period that the bridge is closed, and it also appears that the company will lose another tenant without an opportunity to re-rent the store during the same period. It is intimated that an adjustment should be made for these losses.

The letter of the attorneys speaks of the use and protection of the Farwell Company foundations and other matters of this kind. In so far as the City may benefit by the use of the Farwell Company property, if it does benefit thereby, it would be proper to make due allowance. But with respect to the loss occasioned by non-payment of rent of some of the tenants, or the moving away of any tenant on account of the construction work and the necessary closing of the bridge, there is no liability whatever on the City.

Our Supreme Court held, in *Osgood v. City of Chicago*, 154 Ill. 194, that loss of rent by reason of obstructions to access to a building upon abutting premises during the construction of a bridge and its approaches is a burden in-

identally imposed upon such property, and cannot be recovered.

Again in the case of *Chicago Flour Company v. City of Chicago*, 243 Ill. 268, it was held that temporary interference with access to abutting property during the time a street is obstructed for the purpose of constructing a public improvement is not a damaging or taking of property within the meaning of the constitution, and the City is not liable to the owner of such property for loss occasioned thereby.

In both of these cases it would seem that the equities were even greater than in the case of the *Farwell Company*; yet the principle of law is applicable in the present instance. There are numerous other decisions of our courts which hold the same way.

As to the time that may be allowed for the temporary obstruction of a street such as will not give rise to an action of damages against the City at the suit of an abutting owner, we point to the case of *Lefkovitz v. City of Chicago*, 238 Ill. 23, where it was held that such "temporary" obstruction is the opposite of "permanent," and means a period of time commensurate with the reasonable prosecution of the work which is being carried on.

The rule with respect to matters of this kind is that the damages of a person whose property is located near the bridge are of the same kind as the damages of the public at large, although necessarily greater in amount in so far as each individual member of the public is concerned. Hence, there can be no recovery.

We might incidentally call attention also to a line of cases in which it is held that there is no obligation imposed on the City to maintain or restore traffic on a street. The owner of property abutting on this street has no right that traffic shall pass in a particular manner or that the City shall not alter the conditions in such a way as to affect the traffic.

City of Chicago v. Spoor, 190 Ill. 340.

Hohmann v. City of Chicago, 140 Ill. 226.

We are therefore of the opinion that no legal claim for damages can arise by reason of the proposed closing of the street during the reconstruction of the bridge.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Living Room in Direct Communication With Laundry.

July 28, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

We have your communication of July 21st in which you seek an interpretation of Section 2381 of The Chicago Municipal Code of 1922, which reads as follows:

“2381. SLEEPING IN LAUNDRIES PROHIBITED.) No person shall be permitted to sleep in any laundry, nor shall any sleeping room or living room be in direct communication with any laundry. No laundered or unlaundered fabric belonging to the trade of any laundry shall be stored or kept in any room which is used for living purposes.”

We are of the opinion that the City Council, in passing an ordinance prohibiting “direct communication” between living or sleeping rooms and a laundry, intended a complete and permanent separation. The use of a partition from floor to ceiling, with a door connecting the living or sleeping room with the laundry, of necessity is at times an “open” communication, and therefore a “direct” communication.

Accordingly, you are advised that the allowance by your department of the use of such a doorway in laundry establishments should be discontinued.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Ice Cream Factories and Laundries in Basements.

July 29, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

We have your letter of recent date in which you seek the interpretation of this office as to the intent and scope of Section 1984 of The Chicago Municipal Code of 1922, which interpretation should also govern as to Section 2380, affecting laundries, because the wording of both sections is practically identical except for the commercial uses specified in the respective sections. Section 1984 reads as follows:

“1984. LIGHT — VENTILATION — FLOORS.) No ice cream factory shall be established, maintained, conducted or operated in any *cellar, basement, or in any other room or place in any building* which is not provided with sufficient natural light by means of windows or skylights, so that during the period between one hour after sunrise and two hours before sunset on sunshiny days, illuminameter tests shall show a minimum illumination of five feet candles in all parts of such room or place

not directly obstructed by machinery or other equipment; and the general arrangement of all machinery and equipment shall be such as not to unnecessarily obstruct the lighting and ventilating through such windows and skylights. Adequate ventilation must be provided by means of windows, skylights, air shafts or air ducts or, if necessary, by mechanical apparatus, so as to insure a free circulation of fresh air at all times. The floors shall be constructed of concrete, cement, asphalt, or other similar impervious material, and shall be made and maintained so as to be rat-proof. The side walls and ceilings shall be smoothly plastered, tiled or sheathed with metal or wood sheathing and shall be kept clean and in good repair."

We are of the opinion that ice cream factories and laundries are permitted to be conducted and operated in cellars and basements, providing the lighting, ventilating and other sanitary requirements as provided by said sections are conformed to. We reach this conclusion for the reason that the City Council in adopting said provisions did not specifically forbid the use of cellars or basements by prohibiting the same, but rather passed said ordinances in such manner that because of the grammatical construction of the sections referred to by the use of the conjunction "or" instead of "and" no other interpretation could be inferred.

Accordingly, you are advised that, subject to meeting the requirements as set forth in our ordinances, your department may allow the use of cellars and basements for the purposes provided in said sections.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Demand to Preserve Fund for Payment of Judgments.

July 29, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date to which are attached the notice and demand of the attorneys and what purport to be copies of orders granting writs of mandamus in the cases of Walter Sobieski, John Sobieski, Katherine Grossman and Viola Pauley. The notice and demand states that orders were entered in the cases mentioned requiring the City to pay the judgments which had been obtained by these various parties; that appeals had been prayed, thereby suspending the issuance of the writs, and demand is made that the fund appropriated for the payment of judgments should not be depleted pending the appeal. You ask us how you shall proceed in order to protect the City's interests.

An examination of the copies of the orders mentioned above discloses that three of them relate to judgments entered against the City in 1924. The fourth on its face appears to relate to a judgment entered June 7, 1925, but we are informed that this was in fact entered on June 7, 1923, and that the copy is wrong.

We do not believe that the service of this notice and demand on you imposes any obligation on you or on the City. The appropriations in the annual appropriation bill, of which this fund for the payment of judgments is one, are intended for expenses that are incurred during the current fiscal year. In order that a debt of a previous year may be paid there must be a specific appropriation therefor. (*People ex rel. Redman v. Trustees of University*, 283

Ill. 494-503). The reasons for this are manifest, and the decision cited gives only a part of them.

It is obvious that the person who has obtained a judgment cannot pick such appropriation as will perhaps fit his case and say that the appropriation was made for him. He has the right to compel a specific appropriation and levy to be made, but he has not the right to disturb the appropriations made for other purposes for the current year by cutting out enough from them to pay his judgment. Therefore, you may properly ignore the notice given to you.

We return herewith the notice and demand and the copies of the four orders which we refer to herein.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Investment of Funds of City in Miscellaneous Improvement Bonds.

July 30, 1925.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In your letter of this date you state that the City Comptroller is desirous of selling certain bonds, which you mention, among these being Harbor Construction Bonds, House of Shelter Bonds, Michigan Avenue Street Improvement

Bonds, Police Department Building Bonds and Public Comfort Station Bonds. The total amount so to be sold amounts to \$316,500. You ask whether the City Treasurer has the authority to make the investment in these particular bonds and to accept interim certificates in lieu of the bonds.

All of the bonds about which you inquire have been legally issued, and their validity has not even been questioned. They are all bonds representing an obligation of the City pledging its entire credit. Such being the case, all these bonds come squarely within the provisions of Section 1 of "An Act concerning municipal funds," approved June 5, 1911, as amended. We see no reason why these bonds should not be accepted by the City Treasurer for the purpose of investment of surplus moneys not immediately necessary for the purposes for which the same were collected.

The City Council has made provision by ordinance for the manner in which such purchase may be made. It has provided, among other things, that for the purpose of facilitating the handling of the bonds evidencing the investments of the City Treasurer, interim certificates to be signed by the Mayor and attested by the City Clerk may be issued. Section 57 of The Chicago Municipal Code of 1922 provides also that such interim certificates shall be held by the City Treasurer in lieu of the original bonds, and the original bonds shall remain unexecuted during the period in which the interim certificates are held by the Treasurer. This provision of the ordinance is within the power of the City, and constitutes authority to issue bonds in this way. Inasmuch as the original bonds which you describe have not been issued, the interim certificates take the place of them, and the subsequent issuance of bonds for the same obligation would amount to a forgery. Hence, no more risk attaches to taking an interim certificate of this kind than attaches in the case of bonds that were issued in the first place in the precise form required by the ordinance authorizing them.

We are therefore of the opinion that the City Treasurer may legally and properly invest the moneys of the City in the bonds which you describe.

Very truly yours,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Common Law Dedication of Street.

July 31, 1925.

N. E. MURRAY, Esq., Superintendent of Sidewalks.

Dear Sir:

We are in receipt of your letter of recent date, together with a communication addressed to Col. A. A. Sprague, Commissioner of Public Works, and a blue print showing the west side of Menard avenue from the north line of Roosevelt road to the B. & O. C. T. R. R., in reference to the question of sidewalk line on Menard avenue.

You advise us that the sidewalk on the west side of Menard avenue between Roosevelt road and the B. & O. C. T. R. R. at the present time is set back seven feet on private property. That you have taken the matter of sidewalk line up personally with Mr. Higgins, who subdivided the property and built the sidewalk, and were informed that the sidewalks in question were built by private contract and that the reason for setting them back seven feet was that, after the subdivision had been made but before any improvements were put in, the subdivider was informed that an ordinance requiring the elevation of the railroad tracks to the north

provided for a subway on Menard avenue leading into Columbus Park to connect up with Harrison street, which deflects to the south; on entering the park at Central avenue it touches the railroad right-of-way at about Menard avenue, then curves back to the north, meeting the old Harrison street in Oak Park at Austin boulevard. Because of this information the subdivider was led to believe that Menard avenue should be greater than sixty-six feet in width, and to provide for this he set the sidewalks back, intending to dedicate that much for street purposes, but never put the dedication on record. You further state that these walks were built only nine years ago, and that the City would be unable to claim a street by prescription rights.

The Victor Manufacturing & Gasket Company, who now presumably own the premises at the points in question, desire to relocate the sidewalks by shifting them seven feet east from their present point of occupancy, thus altering the subdivider's act and removing them from private property.

You wish to be advised as to whether you should permit this act to be done.

It is apparent as you state that the City has no right by prescription in this parcel of land. It is also obvious that the City can not interfere with the proposed step of the Victor Manufacturing & Gasket Company because of a statutory dedication of the premises. Clearly the requisite acts required by the statute had not been done.

The question that presents itself, however, is rather as to whether there has been, because of the facts stated by you, an easement by way of a common law dedication of the premises. This question of dedication has always been one mainly of *fact*.

Text writers have declared that dedication and prescription are distinguishable, in that dedication is established by proof of an act of dedication and an intent to dedicate without reference to the period of public use, while long user is an essential element to prescription—also prescription is an ad-

verse holding under color of right, whereas dedication, whether express or implied, rests upon the consent of the owner.

Dedication has been defined as the appropriation or gift, by the owner, of land or of an easement therein, for the use of the public—it is based upon public policy and good faith, in that while securing to the public only such rights as it has honestly enjoyed or learned to depend upon, it takes from the land owner nothing that he did not intend to give.

The essential elements that must be taken into consideration in reference to common law dedication in connection with the premises in question are—

(1) It is absolutely necessary to a common law dedication that there should be an intention to dedicate.

City of Chicago v. Hill, 124 Ill. 646.

(2) No particular length of time need elapse to mature a common law dedication.

Moffett v. South Park Commissioners, 138 Ill. 620.

It may take place instantaneously if the intention is present and does not rest upon a lapse of time as does a prescription.

Rees v. City of Chicago, 38 Ill. 322.

(3) The public is an ever-existing grantee capable of taking dedication for public uses and its interests are a sufficient consideration to support them.

Warren v. Town of Jacksonville, 15 Ill. 236.

(4) Where there is an intention by the owner to dedicate land to the public and an act of dedication by him, upon acceptance by the public the easement becomes perfect and irrevocable, whatever may have been the *personal motives* of the owner in making the dedication.

Fairbury Union Agricultural Board v. Holly, 169 Ill. 9.

The intent to dedicate the seven feet in question for street purposes are here undisputed and unequivocal. The

subdivider's personal motives for doing this, according to the decided cases, are unimportant. Consistent with this intention to so dedicate, sidewalks were constructed nine years ago setting back seven feet on the subdivider's property, and from that time until the present the sidewalks have been, from what we are informed, constantly and openly in use by the public. The sidewalks were not laid in the present location in the mistaken belief of boundary or lot lines, but because of the positive desire of the subdivider.

From the cases before us and from the facts as you have presented them, we are of the opinion that there has been a common law dedication in this instance, and that it would now be unlawful for the Victor Manufacturing & Gasket Company to move their sidewalk seven feet closer to the street line as you advise they contemplate doing.

We are herewith returning to you the enclosures you placed before us.

Yours very truly,

BARNETT HODES,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Lien of Forfeited Special Assessments.

Chicago, August 3, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In a letter submitted to us by the Real Estate Agent a number of questions are asked concerning forfeited special assessments and the lien which they create. While the an-

swer to some of these queries is problematical, we submit our views on the subjects asked about.

The Real Estate Agent states that it has been your policy, when parties ask the comptroller to quitclaim the City's interest in tax deeds, to require that all forfeited special assessments be paid before such deeds are given. He states further that Mr. H. W. Butler has a partition suit pending and agrees to bid enough at the partition sale to take care of forfeited special assessments, but wants quitclaim deeds from the City before paying such forfeited specials.

The first question is whether the City's lien on forfeited special assessments would be affected in a partition suit. In reply, we beg to advise you that we do not think that the lien of the City will be disturbed in such proceedings, but there is enough uncertainty about this to make it proper to avoid the issue. Section 203 of the Revenue Act requires forfeiture to the State in case of property not sold at a delinquent tax sale for want of bidders. This presumably puts the title in the State until such time as it is redeemed or the property is otherwise disposed of. In case the State, represented by the County Clerk, is paid the amount due the City, it will be paid to the City, and the lien of the City for such period as it has a lien will remain if it is not paid. But if not so paid, since there is no obligation to carry a special assessment forfeiture forward, there is danger of its being extinguished.

If a partition suit is brought as a chancery proceeding, then under Section 39 of the Partition Act the court has the power to remove any cloud on the real estate. The forfeiture, not having been carried forward, is no longer in the same situation as a tax, and the question whether or not it would be extinguished would depend on whether the lien was still alive. Thus there is a likelihood of the City losing its lien. This would be the case in either event, whether the City was or was not made a party.

Your next question is whether the City should be made a party to a suit for partition on account of its forfeited

special assessments. The City in such a case is not a necessary party, and the suit may proceed without its being brought in, but it would be a proper party and it would have the right to appear if not made a party. If not made a party, and if it does not appear on its own motion, whatever rights it has by virtue of forfeited specials would remain in the City.

You next inquire whether the court would require that the general taxes and special assessments should be paid before distributing the proceeds to the fee holders. This depends somewhat on the nature of the proceedings and also on the status of the tax and special assessment claims. Such a proceeding may be brought without reference to the taxes at all, and the lien for taxes and special assessments will then remain as before. If an attempt is made to clean up the title as against tax forfeitures and sales, the court will require proof of the invalidity of a tax deed (*Glos v. Carlin*, 207 Ill. 192), and will either require the payment of the last forfeiture or have it specified in the decree that the lien of the forfeiture is not extinguished. The same is true of all live liens. In other words, the court will not permit the wiping out of live claims for taxes. On the other hand, if the lien is wiped out by lapse of time the court will not revive it.

Finally, you ask whether the general tax forfeitures would have priority in case the sale did not realize enough to pay both general taxes and special assessments, or would such small bid result in the defeat of the sale or in the court ordering the forfeiture liens reduced. The court would not in any event order a reduction in the amount of the claims under the forfeitures. It might not permit the sale to be made. Section 27 of the Partition Act contemplates a sale for a sum sufficient to effect a proper partition of the property, and therefore requires that it be sold for not less than two-thirds of the value fixed by commissioners appointed to make an appraisal. Therefore, it is within the power of the court to withhold a decree if the property does not bring enough to pay the taxes and special assessments.

As to priority, the court will not, in a partition suit, give priority of one valid and live claim over another. If there is not enough to pay all such claims there is nothing to partition.

In the case presented, we understand that it has gone to final decree so far as the order of sale is concerned, but that the court has not yet confirmed the sale or ordered a distribution. We therefore recommend that you get in touch with Mr. Butler and see whether he will pay for the tax deeds the City has, and whether the sale price was sufficient to cover the forfeited special assessments.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

Award of Contract to Lowest Bidder.

August 6, 1925.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

In response to your request for an opinion as to whether the Department of Gas and Electricity of the City of Chicago is justified in awarding to the lowest bidder the contract for furnishing traffic signals and traffic signal controllers to be used in connection with the installation of automatic traffic control equipment, we beg to advise that this department knows of no reason why negotiations can not be made with the said lowest bidder.

We know of no facts wherein the lowest bid submitted to you was not in full compliance with the provisions as submitted to the public contained in the advertisement in the Chicago Evening Post and the contract and specifications.

The fact that the low bidder quoted prices on three different signals, and submitted but one sample for your inspection does not alter the matter in the least, even though the two remaining samples were not submitted until after the bids were in and opened. The familiar principle that the law does not concern itself with inconsequential trifles is applicable in this case.

But aside from this proposition, or rather in full conformity therewith, the contracts of a city are governed by the same general principles of law as any other contracts, and we are therefore of the opinion that you may safely award the contract to the lowest bidder on these signals in question.

Yours very truly,

GEORGE E. ASSELIN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Right to Reject Bids on Contracts.

August 6, 1925.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

In response to your request for an opinion as to what action should be taken by the Department of Gas and Electricity of the City of Chicago as concerns the bid of Westinghouse Electric and Manufacturing Company, submitted in answer to your advertisement and proposals for furnishing post tops and concrete lamp posts for the extension of the municipal electric street lighting system, we beg to state, that,

in our opinion, you can disregard the bid of the Westinghouse Electric and Manufacturing Company, since the method adopted by said company for the construction of the concrete posts does not comply with the express conditions as specified on page 16 of the contract, under head of "Method of Manufacture," even though it considers its process is superior to the one specified in the proposals and contract of the Department of Gas and Electricity.

In view of the above facts, it is discretionary with you to accept the next lowest bidder, if the bid is in full compliance with the terms of the proposals and contract, or reject all bids, as may be deemed by you to be for the best interests of the City of Chicago.

Yours very truly,

GEORGE E. ASSELIN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Punch-Board as a Lottery Scheme.

August 10, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In compliance with your request of the 5th instant, we must hold that Mr. McNamara's scheme as outlined in his letter to you under date of August 4, 1925, amounts to a gambling proposition. Mr. McNamara, among other things, claims that for each purchase of a package of mints the purchaser is entitled to a chance on a punchboard from which

the purchaser may draw a lucky ticket that would entitle the owner of such ticket to a box of candy.

Mr. McNamara evidently believes because the purchaser would not suffer a loss, all element of gambling or lottery would be eliminated. Our courts do not hold to any such principle. In the case of *Horner v. U. S.*, reported in 147 U. S., page 449, will be found the following language:

“Our statute does not justify a court * * * in deciding a thing not a lottery, simply because there can be no *loss*, when there may be very large *contingent gains*, or because it lacks some element of a lottery according to some particular dictionary’s definition of one, when it has all the other elements, with all the pernicious tendencies which the state is seeking to prevent.”

Other cases to the same effect are:

Elder v. Chapman, 176 Ill. 150.

Loveland v. Bode, 214 Ill. App. 399.

State v. Dalton, 22 R. I. 83.

Lynch v. Rosenthal, 144 Ind. 86.

Taylor v. Smetten, L. R. 11 Q. B., Div. 207.

Reg. v. Harris, 10 Cox, C. C. 352.

Davenport v. Ottawa, 54 Kan. 711.

State v. Lumsden, 89 N. C. 573.

Burks v. Harris, 23 L. R. A. (N. S.), 626.

Yours very truly,

JAMES I. McCARTHY,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Definition of "Common Carrier" as Used in Ordinance Defining Duties of Superintendent of Police.

August 11, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In re your letter of July 29th, requesting this office for a definition of the term "common carrier," as employed in an ordinance passed February 13, 1924 (Council Journal, p. 1838), we beg to submit the following:

The ordinance in question authorizes the Superintendent of Police, on the application "of any common carrier to appoint and swear in any number of special policemen * * * for the protection of persons, passengers and property being transported in interstate or intrastate commerce."

A common carrier generally is any person, firm or corporation engaged in the transportation of freight or passengers, or both, for hire, and so holds itself out to the public without discrimination, and includes carriers by rail or water, street car and elevated lines, busses, taxicabs, etc. The fact that specific mention is made in the ordinance of interstate and intrastate commerce might, at first glance, suggest the idea that the council had commercial railroads in mind when it used the term "common carrier." Street and elevated car lines, busses and cabs are more particularly local transportation instrumentalities, and are seldom, if ever, referred to as interstate or intrastate carriers, although they might very well be both, and frequently, as in the case of street car lines, they are.

However, local transportation agencies are undeniably intrastate carriers, and a liberal construction of the ordinance would necessarily include them within its scope. The authority vested by the ordinance may be exercised on the

application "of the proper officer of any common carrier." This authorization does not suggest that the council intended to limit the scope of its enactment to steam railroads, and it is only the subsequent use of the language "interstate or intrastate commerce" that does suggest the intention of such limitation. However, the intention of the council is to be determined from the ordinary meaning of the language employed, and, as above suggested, any "common carrier" may be any rail or water line, bus line, street car or elevated line or taxicab company.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Rights of Civil Service Employee While Separated From Service.

Chicago, August 11, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You forwarded to us, under date of July 22d, two letters of Harry Leser, 1817 Jackson boulevard, written respectively to the Comptroller and to Alderman Touhy, in which he asks for compensation during the period he was separated from the service. In addition to these letters, we have secured the civil service record of the claimant, which we return with the other papers for your further consideration. The question you ask is whether Mr. Leser is entitled

to such compensation, and if so how much, and you also ask us to draft a council order if action by the City Council is necessary.

From the letter written to Alderman Touhy we gather that Leser was employed by the City since September 1, 1875. We have not checked up on this, because it cuts no figure in the consideration of his rights as a civil service employe. He also says that for the past 21 years he has held the position of Superintendent of Construction in the Fire Department. We have examined the records and find this is correct, except that he ceased to act for the Fire Department and worked in the Department of Gas and Electricity in the last few years. He was only carried on the Fire Department pay rolls in order to save his pension rights.

The Civil Service Commission's records show that Leser became an employe with the same title under the civil service rules on November 11, 1905; that he continued in the same position, with several changes in salary from time to time until June 15, 1924, when he was taken off the pay roll; that he was reinstated January 26, 1925; that his separation from the pay roll was not the result of any suspension pending charges or of any ruling of the Civil Service Commission.

This record is supplemented by the following facts: The annual appropriation bills for 1923 and 1924 carry this position in the Fire Department under the heading "Detailed to Department of Gas and Electricity"; no report of transfer from the Fire Department to the Department of Gas and Electricity has ever been made to the Civil Service Commission; no report of separation from the service was made by either department; no reason has been given for such separation from the service; no pay was received by Leser during the time he was off the pay-roll; no temporary employe was placed in the position and no one drew the pay for the same; the salary appropriated for the place in 1924 was at the rate of \$3,900 per annum up to July 1st, and at the rate of \$4,080 thereafter; in 1925 there was no appropriation for the

place in the Fire Department, but the sum of \$4,260 was appropriated in the Department of Gas and Electricity for a place with the same title; the claimant was willing at all times to work in the place.

It would seem from the facts presented that the claimant is entitled to salary for the time he was off. The questions raised by the situation are not new ones—they have all been authoritatively settled.

In the case of *People ex rel. Roderick v. City of Chicago*, 283 Ill. 462, it was held that the head of the department could not drop a Civil Service employe whose salary had been duly appropriated for in the absence of some good cause such as a *bona fide* lack of funds or lack of work. In the case of *City of Chicago v. Luthardt*, 191 Ill. 516, it was decided that the legal right to such a position carries with it the right to the salary.

Probably the case which fits the facts stated above better than any other is the case of *People ex rel. Jacobs v. Coffin*, 282 Ill. 599. The gist of that decision is that, while the City has the right to actually and in good faith discontinue any position when same becomes no longer necessary or useful, neither the City nor the Civil Service Commission has the right to continue the position and remove the employe until charges have been preferred against him and sustained by the commission in the manner provided by law.

Under these circumstances the claimant would be able to prosecute his claim for salary successfully, since we have not even the defense of payment in good faith to another incumbent. We therefore recommend payment without suit.

The salary for the period from June 16 to July 31, 1924, is at the rate of \$325 per month; from August 1 to December 31, 1924, at the rate of \$340 per month; and from January 1 to January 25, 1925, at the rate of \$355 per month. The total figures, \$2,483.33.

We have drafted an appropriate council order for that amount, and we present same herewith, together with the two

letters of the claimant and the memorandum showing civil service record.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Enforcement of Zoning Ordinance—Duties of Commissioner of Health.

August 11, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of August 5th requesting the views of this department as to your duty and authority in reference to the enforcement of the Zoning Ordinance.

The state enabling statute, by virtue of which the Zoning Ordinance was adopted, provides as follows:

“All ordinances passed under the terms of this Act shall be enforced by such officer of the City * * * as may be designated by ordinance.”

Section 25 of the Chicago Zoning Ordinance provides as follows:

“Section 25. ADMINISTRATION. This ordinance shall be enforced by the Commissioner of Buildings. The Commissioner of Buildings is hereby empowered and it shall be his duty to administer this ordinance in conjunction with the administration of such portions of the general ordinances of the City of Chicago as are commonly designated as the building code of the City of Chicago in such a manner as to facilitate their joint administration. For

the purpose of enforcing this ordinance the authority vested in him under the said building code is hereby declared to be vested in him under this ordinance."

Section 1774 of The Chicago Municipal Code of 1922, in defining the duties of the Commissioner of Health, reads as follows:

"1774. DUTIES OF COMMISSIONER.) It shall be the duty of the Commissioner of Health to enforce all the laws of the state and ordinances of the city in relation to matters pertaining to the public health and the sanitary condition of the city, to promulgate and enforce all rules and regulations of the board of health or any other state or local authority with power to make rules and regulations concerning the public health, and to cause all nuisances affecting the health of the public to be abated with all reasonable promptness."

In view of the above provisions, it seems to us to be clear that the responsibility for the enforcement of the Zoning Ordinance is placed upon the Commissioner of Buildings, and all violations or attempted violations of the said ordinance should be promptly referred to him for proper action. The Building Commissioner has ample authority to enforce the Zoning Ordinance and it is his duty to do so.

You cite two cases in your letter. One is a petition complaining of the establishment of a sausage factory at 6411 South Green street in an apartment district. Your inspection shows that a sausage factory is being installed in these premises. A license has not been applied for and when applied for, you state, will be refused by your department because the location violates the provisions of the Zoning Ordinance.

Another case is that of a junk yard being established and maintained in the rear of a residence on Potomac avenue, also in an apartment district.

The only ordinance violated in the above two cases is the Zoning Ordinance. In our view of the matter you should report both violations immediately to the Commissioner of Buildings for appropriate action by him.

If a case should arise in which it was sought to establish a business detrimental to the public health and the only ordinance violated was the Zoning Ordinance, and the Commissioner of Buildings, after having his attention called to the matter, declined or refused to act, there is little doubt but that the Commissioner of Health, under the authority vested in him by Section 1774 of the Municipal Code, could take action, even for a violation of the Zoning Ordinance, but that is not the situation here, nor is there any suggestion of any failure to act in the premises by the Commissioner of Buildings.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Distribution of Pamphlet on Streets.

August 12, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your request of the 8th instant for an opinion as to whether or not the distribution of a book, described in a letter from the Chicago Law and Order League, bearing on the front page as follows:

“New Chicago Street Guide”

“Latest—Best—Most Accurate”

“Facts for Every Man”

“Do not throw it away”

“Eighth Edition—Revised”

“Price 25 cents”

is a violation of a City ordinance, the following is submitted:

Paragraph 2673 of The Chicago Municipal Code of 1922 reads as follows:

“ADVERTISEMENTS GIVING INFORMATION CONCERNING CERTAIN DISEASES OR CONDITIONS PROHIBITED—PENALTY.) It shall be unlawful for any person to advertise, print or publish, or cause to be advertised, printed or published in any newspaper or other publication having a general circulation in the city, or which is sold or offered for sale within the city, any advertisement, notice or mention of any kind whatsoever giving or purporting to give any information of, from whom, or where, apparatus, medicine, remedies or alleged cures may be had or obtained for the cure, prevention or treatment of uterine diseases, or of diseases peculiar to females, or of venereal diseases, or of diseases of the genital organs, or of nervous debility, impotence, sterility or barrenness, or of gonorrhea, gleet, stricture, syphilis or affections of the prostate gland. * * * Any person violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.”

As the language of the ordinance is “it shall be unlawful for any person to advertise, print or publish, or cause to be advertised, printed or published in any newspaper or other publication having a general circulation of the City, or which is sold or offered for sale within the City, any advertisement, notice or mention of any kind whatsoever giving information from whom medicine, remedies or alleged cures may be had for the cure of venereal diseases or diseases of the genital organs,” etc., and this pamphlet carries on the front page words “Price 25 cents,” showing that it has been sold or offered for sale, this is a violation of the foregoing ordinance.

Yours very truly,

ARTHUR MANNING,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Purchase of Machinery and Vehicles from Transferred Appropriation.

August 12, 1925.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir :

You referred the writer to the transfer authorized by the City Council on July 22, 1925 (see Council Journal, page 1091), whereby the Department of Police was authorized to purchase machinery and vehicles for \$75,000 out of money which was originally appropriated to salaries. You ask whether this conflicts with the provision of Section 5 of the Annual Appropriation Bill, which prohibits the Comptroller and heads of other departments from incurring any liabilities against any account in excess of the amount authorized in the Appropriation Bill for such account, and from changing any salary or wage item therein, and from incurring any liability which will necessitate the transfer from the appropriations for salaries and wages in their respective departments.

We do not understand the section referred to in the Appropriation Bill as being intended as a handicap to the City Council or to prevent the Council from making necessary transfers. The prohibition does not extend to the City Council, and it amounts, in substance, to an admonition to the head of the department that he should not make or incur any liability until the City Council has made the necessary transfer.

We have always interpreted the statutory authority to make such transfers as broadly as possible in order to make effective the power thus given. If it is circumscribed by such a provision as that you point to it would result in a great deal of power being lost to the City Council which it has

found necessary to exercise in the past. In any event, the most that can be said for the provision that you point to is that it is an ordinance which would be overcome by the later ordinance authorizing a transfer in the face of it.

Therefore, we regard the transfer made as above as within the interpretation that we have always given to the statutory provision authorizing the City Council to make transfers.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

Hospital Frontage Consents in Groveland Park.

August 12, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of August 11th.

Application has been made to you, you state, for a permit for the erection of a hospital at 646 to 660 Groveland Park. The proposed hospital is to front on Groveland Park and the requisite frontage consents of the Groveland Park property owners have been secured.

The question, you state, has been raised as to whether the Building Commissioner has authority to issue the permit in view of the fact that the proposed hospital fronts upon Groveland Park. You enclose a booklet of the Groveland Park Association which sets forth the legal history of the dedication of Groveland Park.

Groveland Park is a private park of about three and one-half acres, lying between Cottage Grove avenue and Lake Michigan, just south of 33d street. It was laid out by the

Hon. Stephen A. Douglas in 1855, the park being set apart for the use of the adjoining lot owners under the following dedication:

“This space is dedicated as a private park by the name of Groveland Park, the title being vested in the State of Illinois, in trust for the use of owners of lots fronting or bounding the same, and to be used and enjoyed by such owners in common as a private park, and for no other purpose whatever, and to be ornamented, regulated and protected in such a manner as a majority of such owners shall, from time to time, prescribe, each owner to share in the control and expense in proportion to the number of feet he shall own fronting or bounding on said park, and the alleys to be deemed private alleys subject to like conditions and use.”

Groveland Park is situated within the City of Chicago and the ordinances of the City apply to it with the same force and effect as to all other parts of the City. The Building Commissioner is vested with full power and authority to issue permits for structures in said park which comply with the ordinances of the City.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Dancing Schools as Places of Amusement.

August 14, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

You made inquiry some time ago with reference to the licensing of so-called dancing schools. In reply, we submit the following:

From the reports of your investigators it would seem that dances are carried on in all parts of the City under the guise of dancing schools. Young women are employed as "instructors," and these dance with male patrons who pay 10 cents a dance, of which 5 cents goes to the proprietor and 5 cents to the "instructor." There does not appear to be any regularity of attendance on the part of either "instructors" or "pupils." In one place visited by your investigators the number of instructors varied on different nights of one week from 5 to 20; in another from 5 to 18. The male patron buys six tickets or more, as he may desire.

The question presented is whether these places should be required to take out licenses as places of amusement, or whether they are to be regarded as educational institutions which we have no power to license.

We do not believe such places can be regarded as schools in the ordinary acceptance of the term. In our opinion, the fact that they are given the name of schools is a subterfuge to evade the license fee and the regulations that would be enforced if the places are to be treated as places of amusement.

A dancing school at best, even if it is run as a place of instruction in the most legitimate manner, has no standing as an educational institution. Thus, it has been held in this state that when you interpret the word "school" as used in the constitution and recognized by law, it does not include a dancing school.

"A school, within the meaning of the constitutional provision, is a place where systematic instruction in useful branches is given by methods common to schools and institutions of learning, which would make the place a school in the common acceptance of the word. What are called schools are conducted for teaching dancing, riding, deportment and other things, which are not schools in the ordinary sense."

The People v. Deutsche Gemeinde, 249 Ill. 132, at p. 137.

Along the same line of thought is the case of *State v. Gager*, 28 Conn. 232, where it was held that a school must have teachers and pupils, and that where persons assembled for the purpose of singing together for their improvement in the art of singing, without a teacher, it was no school. The young women employed in the cases you speak of are not teachers in the sense that the word is ordinarily used. They are compelled to dance 20 dances in order to get \$1 as remuneration for their services, and this in itself would indicate that they are there for the pleasure of dancing rather than for profitable employment. These parties are rather in the position of the parties in the case just mentioned, where they sang together. Here they dance together.

From the above it will readily be seen that a place where there is not even systematic instruction given, and where there is not the semblance of registration or matriculation and no regular plan of instruction and no classification into beginners and advanced pupils, will in all probability be held to be a flimsy pretext for evading regulation as a place of amusement.

In addition to what has already been said, it should be borne in mind that the distinction between a dance as an instructive process and a dance as an entertainment or diversion would be so vague as to make it indefinable, and the licensing of one without licensing the other would amount to an unlawful discrimination. Note the language used by a New York court in passing on the validity of a law involving this point:

“By the act in question, a room or place may be occupied for dancing on Monday without a license being required therefor, and on Tuesday, if the same persons are engaged in the same dance, in the same room or place, under the instruction of a teacher, such room or place must be licensed or the statute is violated.”

People ex rel. Duryea v. Wilber, 198 N. Y. 1.

Dancing schools which are *bona fide* institutions for instruction have always been recognized in this City as in a different class from places of the kind you speak of. We

are convinced that the places you mention will be regarded as places of amusement, and as such they are subject to regulation and licensing the same as all other places of amusement.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Service of Warrants for Return of Fugitives.

August 18, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In a communication dated August 13, 1925, you state that in the past the Police Department has served warrants signed by the Governor for return of fugitives. You further state that it is provided by statute that the warrants shall be served by a sheriff, constable or other person whom the Governor may think fit to entrust with the execution of the warrant. You ask if the warrant may be served by members of your department.

The Supreme Court of this state has held several times that policemen of a municipality are agents of the state.

Even without such holding there is nothing in the nature of the duties of a member of your department to prevent him serving a warrant from the Governor should the Governor appoint him.

Respectfully submitted,

DANIEL V. GALLERY,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Arrests by Officers of Fire Department.

August 19, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We have your communication of the 25th inst., transmitting a copy of letter from Edward F. McGurn, Battalion Chief, in which our interpretation of Section 1184 of The Chicago Municipal Code of 1922 is requested as to whether or not Fire Department officers of a rank lower than division fire marshal can make arrests under said section.

Very definitely has the City Council limited the power of arrest to the marshals only, and unless an amendment to the code is passed by the Council to include other officers in the Fire Department, we are of the opinion that it would be an act beyond the scope of their duties to arrest any person *suspected* of incendiarism and subject such firemen to the possibility of a suit for damages.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Hospital in Private Park.

August 19, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of August 14th relating to the application of the Chicago Memorial Hos-

pital for a permit for the erection of a hospital at 646-660 Groveland Park.

You wish to be advised whether the Building Commissioner is vested with authority to issue the requested permit in view of Section 1863 of The Chicago Municipal Code of 1922, the said section reading as follows:

“LOCATION OF HOSPITAL NEAR SCHOOL OR PLAYGROUND.) No hospital of any kind or description shall hereafter be erected or established within four hundred feet of any property used for a public or parochial school or as a public playground.”

On May 14, 1923, this department passed on a somewhat similar question, and I quote below an excerpt from the opinion given in that case:

“The Chicago Municipal Code of 1922, in Chapter 57, Section 2854, established a Bureau of Public Playgrounds and Bathing Beaches, and in Section 2866 in the same chapter gives an official list of about seventy ‘Parks, Squares and Triangles,’ which are so designated. The same section gives an official list of sixteen other public places which it has formally designated as ‘Playgrounds,’ and further gives a list of other places, which are formally designated as ‘Bathing Beaches’ and ‘Swimming Pools.’

“In Article 3 of Chapter 57, Section 2878, it is provided, that,

“ ‘Each alderman for and in the ward which he represents may without charge to the City provide such playgrounds, parks, breathing spaces and places of amusement as he in his own judgment shall deem fit, and may fence them in and provide all paraphernalia necessary; such playgrounds, parks, breathing spaces and places of amusement to be under the sole care and control of the alderman providing the same.’ ”

“From the foregoing provisions of the code, which appear to be the only provisions which in any way define the words ‘park’ or ‘playground,’ it will be seen that ‘public playgrounds’ are by ordinance specifically designated as such, and are distinguished from public parks, squares and triangles.

“In view of the language in Section 1863 above quoted wherein the prohibition applies to the location

'within 400 feet of any property used * * * as a public playground,' it puts us upon inquiry to determine whether the prohibitive section has a broader application than to any public place officially designated as a 'public playground.'

"The words 'public park' as defined in Volume 6, page 5805, 'Words and Phrases Judicially Defined,' defines a public park in the following language:

" 'A "public park" in the popularly accepted meaning of the present time, may be comprehensively defined as a public pleasure ground. The definitions by the lexicographers do not vary much from this. No doubt the idea of open air and space, with the land kept in grass and trees, as if approximately in the state of nature, still inheres in the general understanding of the word, but it is no longer the dominating thought, as it formerly was. The idea of a public park near a city, as a place of resort for recreation and amusement, necessarily banishes the idea of a home for wild beasts of the chase, even in a modified state of nature. Public parks are recognized as the natural place for walks, drives, a wheel or with horse and carriage, boating, skating, and also as the appropriate location for monuments and statues, either to historic heroes or to pure art, fountains, flowers, music stands, and other agencies of enjoyment of the eye and ear. *Larid v. City of Pittsburg*, 54 Atl. 324, 325; 205 Pa. 1; 61 L. R. A. 332.' "

"In the idea of a 'public park' is comprehended more than a use, either occasional or limited by years, or susceptible of co-existence with a private right capable of concurrent exercise. The words suggest more than an open extensive area of land to be passed over or but temporarily occupied by the public, and on which any private person may still do acts of ownership. To create a public park an extensive area is needed; but the area must be improved, and in various processes, alterative and subversive of natural formation, must much money be absorbed and many years must go by before it is complete. And so costly, so extensive, so peculiar in character, and so undisturbed by interference, must be these processes and the results of them as that there is need of permanency and exclusiveness of public possession and control as against the exercise of any private right therein. *Brooklyn Park Com'rs v. Armstrong*, 45 N. Y. 234, 240; 6 Am. Rep. 70."

“The above quoted definition and description of a ‘Public Park’ within the meaning of the law is altogether too comprehensive to admit of the contention that the City Council had in mind so large an area in choosing the language, ‘used as a public playground’ as contained in Section 1863 above quoted, and while it is true that a section of a public park may incidentally be used as a playground and that children may play in many places therein, we cannot conceive that it was the intention of the council to forbid the building of any hospital within 400 feet of a city park. Certainly the location of a hospital near or adjoining a beautiful park would be a boon to the patients who would be benefited by the air and open spaces and to whom the enjoyment of the view of natural beauties would be available in the tedious hours of distress and in the time of convalescence.

“Your letter of inquiry, however, goes further than the distinction between a park and public playground, and the material matter to be determined is whether the Forest Preserve of Cook County would be included in and within the meaning of the language used in the prohibitory section, ‘any property used * * * as a public playground.’

“The Forest Preserve is within the meaning of the statute clearly different from either Parks or Playgrounds, as above defined. Chapter 57a, Cahill’s Illinois Revised Statutes, 1921, provides partly as follows:

“‘That whenever any area of contiguous territory lying wholly within one county contains one or more natural forests or parts thereof and one or more cities, towns or villages, such territory may be incorporated as a forest preserve district,’ etc.

“The statute then proceeds to designate the needed steps for the creation of a Forest Preserve, and provides for its organization, government and maintenance as a separate legal entity, similar in a way to the Board of Education or the Sanitary District.

“Such an institution as the Forest Preserve, although it includes some of the elements included within the legal definition of a park, is essentially different, is fundamentally based on a forest and is necessarily to some extent primitive and wild, and could not in our judgment, therefore, possibly be considered to come within the definition specifically of a Public Park, still less of a Playground, nor could the fact that such Forest Preserve contained some spots or open places which might be used by children

as a playground be considered to bring it within the intention of the council in using the language, 'any property used as a public playground.' It is inconceivable that the City Council had in mind the Forest Preserve when it established the prohibition made in Section 1863 of the Municipal Code.

"For that reason we are of the opinion that the Forest Preserve is neither a Park nor a Playground within the meaning of said Section 1863, and that the building of a maternity hospital on property adjoining the Forest Preserve is not prohibited by the ordinances in the City of Chicago."

You will note that in the above opinion it was held that a public park is not a public playground within the meaning of Section 1863, and neither is the forest preserve.

Groveland Park is a private park of about three and one-half acres lying between Cottage Grove avenue and Lake Michigan just south of 33d street. It was laid out by the Hon. Stephen A. Douglas in 1855, the park being set apart for the use of the adjoining lot owners under the following dedication:

"This space is dedicated as a private park by the name of Groveland Park, the title being vested in the State of Illinois, in trust for the use of owners of lots fronting or bounding the same, and to be used and enjoyed by such owners in common as a private park, and for no other purpose whatever, and to be ornamented, regulated and protected in such a manner as a majority of such owners shall, from time to time, prescribe, each owner to share in the control and expense in proportion to the number of feet he shall own fronting or bounding on said park, and the alleys to be deemed private alleys subject to like conditions and use."

That which is known as Groveland Park is neither a public park nor a public playground. The writer has personally visited the premises. At the entrance to the so-called park are two large signs bearing the words "Private Grounds, Please Do Not Intrude," and two other large signs bearing the words "Private Grounds."

We are of the opinion that this dedicated private park, which is to be used and enjoyed under the terms of the

dedication by the owners of the lots fronting upon the same, and for no other purpose, is in no sense a public playground within the prohibition contained in Section 1863 of the Municipal Code.

We have to advise you, therefore, that the permit for the proposed hospital should not be refused by you for the reason that the hospital is to be erected within four hundred feet of Groveland Park.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Deduction from Pay on Account of Fines Assessed for Infraction of Rules.

August 19, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your communication of July 21 in which you advise us that some question has arisen in your department regarding the deductions from payrolls, on account of fines assessed for infractions of departmental rules by trial boards against policemen and firemen, as to whether such fines should be credited to the general corporate purposes fund or to the respective policemen and firemen pension funds.

We wish to advise you that direct reference in our statutes, in Section 2 of "An Act to provide for a firemen's pension fund * * *" is made of what the fund consists of, and under Clause (c) of Paragraph 943, Cahill's Illinois Revised Statutes, 1923, we find the following language:

“All fines and penalties imposed upon firemen for breach of any rules of the fire department shall be set apart and placed to the credit of said pension fund.”

We readily come to the conclusion, therefore, that such fines as are imposed upon firemen can be awarded only to the Firemen's Pension Fund.

The situation with respect to the Policemen's Pension Fund differs, because while at one time the statutes governing this fund with respect to this particular item was similar to the Firemen's Pension Fund Law the enactment of a new Policemen's Pension Law which failed to include the provision where all moneys received from fines imposed upon policemen should be credited to its pension fund, by implication thereby repealed such requirement, and no other disposition of such moneys being referred to therein or elsewhere, these deductions can only revert to the Corporate Purposes Fund.

Confirmation of this contention is apparent when we read from the act the following definite statement of the various sums to be contributed by the City as its contributory share of this pension fund.

“The various sums, hereinafter stated, to be contributed by such city for the purposes of this Act, and any interest to be contributed by such city in accordance with the provisions of this Act, shall be taken from the revenue derived from said tax, and, except for the purpose of defraying the cost of administration of the annuity and benefit fund herein provided for during the calendar year in which this Act shall come in force and effect in such city, *any money of such city derived from any source other than the levy and collection of said tax or the sale of tax anticipation warrants in accordance with the provisions of this section shall not be used to provide revenue for the annuity and benefit fund herein provided for.*” (Italics ours.)

The above is from Section 11 of an act entitled “An Act to provide for the creation, setting apart, maintenance, and administration of a policemen's annuity and benefit fund in cities having a population exceeding two hundred thousand inhabitants.”

It may be contended that this item of fine moneys is not strictly a direct contribution by the City, and therefore the above provision does not apply, but this is nevertheless true, that if such money is not paid into the treasury of the Pension Fund then it can only remain in the Corporate Purposes Fund, and its diversion to the Pension Fund would automatically deprive the Corporate Purposes Fund of this income.

It is our opinion, therefore, that not only by implication but by direction also, is it intended that fine moneys should not be paid into the Policemen's Pension Fund.

You will accordingly credit the Firemen's Pension Fund with moneys assessed against members of the Fire Department, and apply moneys assessed against members of the Police Department to the credit of the Corporate Purposes Fund.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Payment of Salary to Temporarily Disabled Firemen.

August 19, 1925.

HON. JOS. F. CONNERY, Fire Commissioner.

Dear Sir:

Replying to your letter of the 17th inst., in which you request an opinion from this office as to whether or not you have the discretion to permit temporarily disabled firemen to receive their usual salary for a period of one year, we have the following to say:

Section 1199 of The Chicago Municipal Code of 1922 specifically allows an inactive fireman to receive full salary for a period of twelve months whenever disability arises from the performance of his duties, and under Section 1200 of said code there devolves upon the Fire Commissioner the duty to satisfy himself by means of the City Physician's certificate and collateral evidence, whether to accept or reject the claimant's application for leave from duty with full pay.

Explicitly stated, you may use your discretion to determine whether or not a fireman claiming disability is sufficiently incapacitated to retire from active service for a period of twelve months or less, but beyond that decision your discretionary power ceases.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Maintenance of Bureau of Complaints.

August 20, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

With reference to your inquiries as to the possibility of the City of Chicago collecting \$5,000 per annum from the Commonwealth Edison Co. for the maintenance of a Bureau of Complaints, we submit the following:

On November 26, 1913, the City Council passed an ordinance for the purpose of fixing, under the Act of the General Assembly, approved May 18, 1905, and in force July 1, 1905,

the maximum rates for supplying electricity for power, heating and lighting which may be charged for a period of years ending November 30, 1918, by the Commonwealth Edison Co., and for certain other purposes as set forth in the ordinance.

The section of the ordinance pertaining to the maintenance of a Bureau of Complaints is as follows:

“Section 3. Said Commonwealth Edison Company shall pay to the City of Chicago, and by the acceptance of this ordinance shall be understood as expressly agreeing to pay to the City of Chicago, a sum of five thousand dollars per annum for the support and maintenance of a Bureau of Complaints, or other officer or officers designated for that purpose by the City of Chicago, established, or to be established, by the City of Chicago for the purpose, among other things, of regulating and taking care of the complaints of customers or consumers of the said Commonwealth Edison Company, the said sum of money to be paid as follows: Two thousand five hundred dollars on the first day of January, 1914, and two thousand five hundred dollars on the first day of July, 1914, and a like amount on the first day of January and July in each year thereafter up to and including the year 1918. The said sum of five thousand dollars per annum shall be paid to the City Comptroller of the City of Chicago.”

The Commonwealth Edison Co. paid \$5,000 per year up to the termination of the ordinance, November 30, 1918. On July 20, 1925, we suggested to the Commonwealth Edison Company that the payments be voluntarily resumed, as the Bureau of Complaints is still functioning, but our suggestion was declined, as outlined in Mr. Doyle's letter attached hereto. It should be remembered, however, that the Bureau of Complaints, as now in effect under the Commissioner of Public Service, handles all public utility complaints without compensation from the other concerns involved, and is not confined solely to the complaints of the Commonwealth Edison Company's customers.

: We therefore are of the opinion that at the expiration of the ordinance, November 30, 1918, the right of the City of Chicago to collect, from the Commonwealth Edison Com-

pany, \$5,000 per annum for the maintenance of a Bureau of Complaints, terminated.

Respectfully submitted,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Claim for Salary of De Jure Municipal Court Judge.

August 20, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Alderman:

We have your communication of July 14, 1925, requesting an opinion from this office as to the merit of Finance Committee Claim No. 6606 for salary alleged to be due former Judge James Donahoe, for a period from December 1, 1914, to December 1, 1917, during which time Arnold Heap, Associate Judge of the Municipal Court, held office and received salary therefor.

This same question on March 8, 1917, was decided in an opinion rendered by this office and published in the book of "Opinions of the Corporation Counsel and Assistants from July 1, 1916, to December 31, 1919," page 246, which we quote in full because it concerns the same parties as well as the propositions of law then, as now, raised:

"March 8, 1917.

Hon. Eugene R. Pike, City Comptroller.

Dear Sir:

Your communication of the 1st instant enclosing copy of notice served on you concerning the payment of salary to Arnold Heap, Associate Judge of the Municipal

Court, and your request to be advised in the premises, is received. Said notice is as follows:

“ ‘Chicago, Ill., Feb. 28, 1917.

To the Hon. Eugene R. Pike,

Comptroller of the City of Chicago.

You are hereby notified that the undersigned, citizen and tax payer of the City of Chicago, hereby protests payment of further salary to Arnold Heap, an Associate Judge of the Municipal Court of Chicago, and in support of this protest respectfully refers to the decision of the Supreme Court of the State of Illinois, in case number 10961, *Wells v. Robertson et al., James Donahoe, Appellant v. Arnold Heap, Appellee*, rendered at the February term, A. D. 1917.

(Sgd.) Francis E. Croarkin.’

The case referred to in the said notice is an election contest, contesting the election of Arnold Heap, as Judge of the Municipal Court of the City of Chicago. The court in this case reversed the judgment of the Superior Court and remanded the cause for further proceedings with directions to permit appellee, Arnold Heap, to plead any further or other defense he may have to the action.

Arnold Heap received his certificate of election and received his commission as Associate Judge of the Municipal Court of Chicago from Edward F. Dunne, Governor of Illinois, and was sworn in, and has since occupied, and is still exercising the functions of said office pursuant to said commission.

Under a similar state of facts, our courts have repeatedly refused relief by injunction to restrain the payment of salary to a *de facto* officer. The court in the case of *Lavin v. Commissioners of Cook County*, 245 Ill. 496, at page 505, said:

‘This court, in *People v. Lieb, supra*, cited with approval *Brown v. Lunt*, 37 Me. 428, where a *de facto* officer is described as one who actually performs the duties of the office with apparent right, under claim of color of appointment or election; and also the case of *Ex parte Strang*, 21 Ohio St. 610, where it is said: “The true doctrine seems to be, that it is sufficient if the officer holds the office under some power having color of authority to appoint, and that a statute, though it should be found repugnant to the constitution, will give color.” The court further says in the *Lieb* case: “To constitute an

officer *de facto* it is not necessary that he should derive his appointment from one competent to invest him with a good title to the office," citing *Fowler v. Beebe*, 9 Mass. 232, and *Conover v. Fowler*, 10 *id.* 291.

'Under the undisputed facts appearing in this record Loesch was a *de facto* special state's attorney under any definition that may be applied to him and as such entitled to compensation. If we are right in this conclusion and if Loesch was at least a *de facto* special state's attorney, then the next inquiry is, has plaintiff in error, as a citizen and a tax-payer, any standing in a court of equity to enjoin him from the performance of the duties of his office or from receiving the emoluments thereof?

'The doctrine is well settled that a court of equity is not the proper forum to determine a contest between conflicting claims of title to an office. (High on Injunctions, Sec. 1312, and cases there cited.) In Section 1314 of High on Injunctions it is said: "It may be affirmed as a general and well established rule that equity will not lend its interference in a contest between conflicting claimants to an office to enjoin the incumbent *de facto* from receiving the salary, fees or emoluments, pertaining to such office, since such interference would, in effect, practically decide the disputed question of title involved, and would thus usurp to a court of equity, through its preventive remedy by injunction, a jurisdiction which can only be exercised in a legal forum." The rule laid down by High, above quoted, has often been approved by this and other courts.

'The case of *Burgess v. Davis*, 138 Ill. 578, is an authority in this state directly in point and must be held controlling upon the point now under consideration. The *Burgess case* was a bill in chancery filed by a tax-payer on behalf of himself and all other tax-payers of Cook County, against the county clerk, county treasurer and Richard Prendergast, to enjoin the county officers from paying out of the county treasury any money to Judge Prendergast on account of salary due him as county judge. The ground upon which the tax-payer based his right to an injunction was, that Prendergast had accepted the office of trustee of the Sanitary District of Chicago, which was incompatible with his office as county judge, whereby, it was contended, he had resigned the office of judge of the county court and that said office had become vacant, and that Prendergast was not entitled to any salary as judge of the county court and

that the same ought not to be paid to him out of the public funds of the county. In disposing of that case this court, on page 581, quoted from High on Injunctions, as follows: "Courts of equity will not interfere by injunction to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature and cognizable only by courts of law." It was admitted by the bill that Prendergast was *de facto* county judge, and this court, on page 582, further said: "A court of equity will not entertain jurisdiction for the purpose of enjoining a *de facto* incumbent of an office from performing its duties. Such result must be effected by judgment of ouster in a *quo warranto* proceeding. It follows that equity will not interfere to enjoin the payment of fees, salaries or emoluments to a *de facto* incumbent of an office. Public policy will prevent the courts from interfering to disturb a *de facto* officer in the receipt of the fees," citing *Stone v. Wetmore*, 42 Ga. 601.'

Until a judgment of ouster has been rendered from the court wherein the contest was held, you would not be justified in withholding salary. If the contestant is successful in his suit, he has an action against the *de facto* officer for the salary received while he was unlawfully kept out of office, but he has no action against the city for the money paid during the pendency of the contest.

Scott v. Crump, 106 Mich. 288.

Michel v. City of New Orleans, 32 La. 1094, 16 L.

R. A. (N. S.) 794.

We would advise you, therefore, to continue the payment of salary to Arnold Heap, Associate Judge of the Municipal Court, until a judgment of ouster is issued in said contest.

Yours very truly,

GEORGE A. CURRAN,

Assistant Corporation Counsel.

Approved:

SAMUEL A. ETTELSON,

Corporation Counsel."

In view of the length of this opinion, which includes excerpts of court decisions germane to the question involved, as well as listing other citations in relation thereto, and be-

cause there has not been offered sufficient authorities to the contrary by Mr. Donahoe, we are inclined to agree with the conclusions offered in the above quoted opinion.

The claimant, in support of his claim for salary, cites one case, viz., *People v. Bradford*, 267 Ill. 486, and an examination of the facts therein discloses a decidedly different situation than exists in the Donahoe case, which cannot possibly be considered in an analogous vein, and therefore is irrelevant.

Accordingly, this office restates its position that James Donahoe is not entitled to the salary of the office which had been theretofore paid Judge Arnold Heap, and his claim can properly be rejected by your committee.

We return herewith all papers submitted with your letter of inquiry.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Claim for Damage on Account of Blasting in Connection with Laying of Sewer and Water Pipes.

August 22, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Upon receipt of your letter of August 13, 1925, relative to the claim of Mr. F. S. Mittenbuler for damage to property at 7415 and 7417 Kingston avenue, an investigation without success was made in the office of the Corporation Counsel and the City Attorney to locate the files referred to. We have obtained and are enclosing, however, duplicate copies of the

correspondence referred to in the City Engineer's letter to you of April 9, 1920.

This claim is for damage sustained in 1917 caused by City employes blasting in connection with the laying of sewer and water pipes in Kingston avenue. The claimant cannot now enforce an action by suit if the City desires to plead the Statute of Limitations.

If, however, the plea of the Statute of Limitations is waived by the City, in our opinion the facts indicate liability. In blasting trenches for sewer and water pipes, the liability of the City in this instance is the same as that of an individual or private corporation.

Wagner v. City of Rock Island, 146 Ill. 139.

City of Chicago v. Selz, Schwab & Co., 202 Ill. 545.

We are unable to state the exact amount the claimant probably would have recovered if suit had been filed within five years after the cause of action had accrued, as there is a serious conflict as to the actual damage sustained; as outlined in Mr. John S. Dean's (Asst. Engr. of Water Works Construction) report of November 15, 1919, attached hereto.

However, the legal measure of damage, in recovering for injury to a building by dynamite blasts, is the difference between the market value of the property before and after the blasting. If there had been a depreciation of the market value of the property in question, as a result of the blasting, the owner would have been entitled to repairs to restore it to its condition and market value prior to the blasts, as that would have represented the depreciation.

Peck v. Chicago City Railways, 270 Ill. 40.

Bruno v. City of Chicago, 214 Ill. App. 498.

Respectfully submitted,

LAWRENCE J. FENLON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Letting of Contract for Dead Animals.

August 27, 1925.

HON. WILLIAM E. DEVER, Mayor.

Dear Mr. Mayor:

On August 21, 1925, Commissioner of Health Herman N. Bundesen, transmitted to you copies in triplicate of a contract for the removal of dead animals for the period from August 14, 1925, to February 1, 1928. You were advised by Dr. Bundesen that the contracts had been signed by the Canal Melting Company, the Comptroller, the Commissioner of Health, and approved by the Corporation Counsel, and your signature was requested.

This contract provides for an expenditure of \$57,500 per annum. Section 2102 of The Chicago Municipal Code of 1922, concerning this matter, provides:

“ * * * If it shall appear to the mayor and commissioner of health that they are able to enter into a contract with a reliable and responsible bidder for the removal of dead animals for a period of not less than one year nor more than five years, *without it being necessary for the city to incur the expenditure of any money for or on account of such removal of such dead animals*, the mayor and commissioner of health are authorized and empowered to enter into * * * a contract. * * * ”

Authority to enter into any contract of this nature would not be required from the City Council if the City were incurring no financial liability. The contract in question, however, places an obligation upon the City of \$57,500 per year, or \$172,500 during the life of the contract, and for that reason it is our opinion that the provisions permitting the contract to be entered into by the Mayor and the Commissioner of Health *without Council authority* can not now apply.

It is my suggestion that until the City Council authorizes this contract the Mayor should withhold his signature therefrom.

All papers are returned herewith.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

Location of Garage in Proximity of Juvenile Detention Home.

August 28, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of August 20th. It is proposed to erect a public garage at 2211-2213 West Roosevelt road. This location, you state, is within 200 feet of the Cook County Juvenile Detention Home.

You wish to be advised whether the location of the proposed garage at that address would come within the prohibition of Section 929 of The Chicago Municipal Code of 1922, which reads as follows:

“It shall not be lawful to locate, build, construct or maintain any garage within 200 feet of any building used as and for a hospital, church or public or parochial school, or the grounds thereof.”

The Cook County Juvenile Detention Home is used for the purpose of detaining delinquent and dependent children pending the disposition of their cases by the Juvenile Court. The stay of the children there is of a purely temporary character and the average time spent there by each child is six days. For the delinquent children the home takes the place of the County jail.

The Cook County Juvenile Detention Home not being a church or a hospital, the question that presents itself is whether it is a public or parochial school within the meaning of the above ordinance.

A public school is generally regarded as a school that derives its support entirely or in part from money raised by general state, county or district taxes (*Cook v. School District No. 12*, 12 Colo. 453).

"As used in the American Reports, the term generally refers to the common or public school existing under the laws of each state and maintained at the expense of the public." (Bouvier's Law Dictionary.)

In some cases the term "public school" was held to be synonymous with "common school." (*Jenkins v. Inh. of Andover*, 103 Mass. 97.)

Another fair definition of what a public school is under the more liberal definition given to it at present is:

"Public schools are the schools which municipalities or districts are required to maintain, or authorized to maintain although not required to do so, as a part of the system of common education, *and which are open and free to all the children and youth of the municipalities or districts in which they are situated*, who are of proper age or qualifications to attend them, and which derive their support entirely or in part from money raised by a general state, county or district tax." 35 Cyc. 811.

While we have ordinarily regarded high schools, normal schools and universities which are maintained by the State as public schools, yet the meaning of the term, so far as we have been able to ascertain, has never been extended to include penal or quasi penal institutions such as the Cook County Juvenile Detention Home.

The term "parochial school" is derived from the word "parish." The word "parish" is used to designate ecclesiastical divisions, and when used in this sense is intended to indicate the territory committed to the particular charge of a parson or priest (*Twigg v. Tracey*, 104 Pa. 493).

"A parish is understood to be the territorial jurisdiction of a secular priest or a precinct the inhabitants

of which belong to the same church or they may reside promiscuously among people belonging to any church to be resident in several villages." (*Hebert v. Laville*, 27 Ill. 454.)

It will be seen from the above that a parochial school must be construed as one coming under the territorial limits of a parish of some religious sect which exercises ecclesiastical jurisdiction over the people of that faith therein and provides schools within the same.

The question has heretofore been presented to this department as to whether the Illinois Industrial School for Girls was a public or parochial school within the terms of such an ordinance, and this department held that it was not, it being regarded as a quasi penal institution.

In view of the above, we are clearly of the opinion that the Cook County Juvenile Detention Home is neither a public school nor a parochial school within the prohibition contained in Section 929 of The Chicago Municipal Code of 1922, and that the proposed garage should not be denied a permit because of its proximity to the said Cook County Juvenile Detention Home.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Building Line Restriction Under Zoning Ordinance.

August 28, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of August 25th enclosing a communication from Mr. Joseph F.

Grossman, dated July 15, 1925, requesting the views of this department concerning the interpretation of Section 22 of the Zoning Ordinance.

As I understand it, from Mr. Grossman's letter and from such investigation as I have been able to make, the facts are as follows:

Plans have been submitted for the erection of an apartment building on a lot at the northwest corner of Woodlawn avenue and 52d street. This lot has a frontage of 60 feet on the west side of Woodlawn avenue and is 164 feet deep. All of the lots on Woodlawn avenue between 51st street and 52d street are platted to front on Woodlawn avenue with an 18-foot alley in the rear thereof.

Prior to July, 1925, the west side of Woodlawn avenue in the block between 51st street and 52d street was improved as follows:

At the southwest corner of 51st street and Woodlawn avenue for a distance of 158 feet on Woodlawn avenue there was an apartment building, the street wall of which is at the street line. From a distance of 158 feet south of 51st street to 52d street, a total distance of 285 feet, each lot was improved with a residence whose front street wall was more than 16.4 feet distant from the street line.

On or about July 1, 1925, the parties who propose to build the new apartment building razed the residence standing on the 60-foot lot at the northwest corner of Woodlawn avenue and 52d street, and now wish to erect the apartment building in its stead.

The question submitted, therefore, is, in computing the distances from the street line of the front street walls of buildings in this block, shall we take into consideration the 60-foot lot on which it is now proposed to erect the apartment building and which at the time of the passage of the Zoning Ordinance had thereon a residence whose front street wall was more than 16.4 feet back from the street line, but which has been recently torn down.

We have heretofore held, and still adhere to that opinion, that the building line in a block in all cases is determined by the conditions which existed in the block at the time of the passage of the Zoning Ordinance and not by conditions as they may exist today.

Paragraph C of Section 22 of the Zoning Ordinance reads as follows:

“(c) Where a block is occupied or partially occupied by buildings which existed in the block at the time of the passage of this ordinance, the average of the distances from the street line of the front street walls of buildings shall be the established building line; but where this average distance does not exceed 10 feet *in a block* in which the street wall of any existing building is nearer along the front line to the street than 5 feet the street wall may be erected at the street line. Lots occupied by buildings designed for residence uses permitted in a Residence district, unless the aggregate frontage of such lots exceeds 50 per cent of the total frontage *in the block*, shall be considered as though vacant where located in an Apartment district for the purpose of establishing the building line.”

It is our view that by said Paragraph C a building line was automatically established in every block in Chicago in residence and apartment districts where such blocks were occupied or partially occupied by buildings at the time of the passage of the Zoning Ordinance. That building line may be at the street line or it may be a number of feet back therefrom depending altogether on the conditions then existing. And that building line cannot be made greater or less by the simple expedient of tearing down a building where the front street wall of such building was taken into consideration in computing the building line at the time of the passage of the Zoning Ordinance.

We are, therefore, clearly of the opinion that the 60-foot lot on which the apartment building is to be erected should be regarded for the purpose of establishing the building line as though the said lot was still improved with the residence 16.4 feet back from the street line. With this interpretation

of the ordinance the matter of computing the proper building line in the block becomes a question of mathematics and one with which your department will have no difficulty.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Opinion and Report on Plan for Financing and Constructing a Comprehensive System of Passenger Subways.

August 31, 1925.

HON. JOSEPH B. McDONOUGH, Chairman, Local Transportation Committee:

Dear Sir:

Replying to your letter of June 24th, transmitting a tentative form of ordinance and certain explanatory documents submitted to the City Council by the Chicago Municipal Subway Company, we submit the following opinion and report in regard to the plan therein outlined for financing and constructing a comprehensive system of passenger subways for use in local transportation. Said tentative ordinance comprises fifteen sections and although the language used is, in many places, general and vague, it provides in detail for the various subway tubes to be built; for a subway commission to approve all contracts and supervise all construction work; and also for the legal and financial plan to be used in obtaining necessary funds for construction and acquisition of said subway system and other facilities for local transportation. We will not undertake, therefore, to analyze the whole of

said ordinance, but a review of its principal features is necessary and desirable to make clear the opinion hereinafter stated.

The proposal of the Subway Company, as we understand it, is that the City shall grant to said Company by special or contract ordinance, to be accepted in writing by the company, permission and authority to construct and equip in designated streets and public places of the City a system of rapid transit subway railways suitable for the transportation of persons and property in steel trains. The company shall procure the moneys necessary to pay for construction and equipment of said system through the issuance and sale of bonds of the company, which bonds and the interest thereon shall be paid and redeemed as hereinafter described. While the tentative ordinance submitted provides only for the building and equipment of said subway railway system, representatives of the company have told your committee that said company will, if desired, provide funds for the purchase of the existing elevated and street railway systems of the City by the same means and on the same terms as those upon which said system of subway railways shall be financed. The company's total offer is, therefore, that it will, through the issuance and sale of its bonds, provide funds necessary for creation of a unified local transportation system in the City consisting of all existing elevated and surface street railways and a comprehensive subway railway system, amounting to 118 miles or more of single track subway, if the City will assume to provide for the payment of the principal and interest on said bonds in the manner hereinafter described.

The tentative ordinance and also the explanations of the company's plan offered to your committee indicate that said unified system of elevated, surface and subway railways is ultimately to be owned by the City and operated by it or its agents or lessees. We have been unable, however, to determine from said ordinance at what time title to said subways and other local transportation facilities shall pass to the City or in what manner such title or the possession and right to

operate such transportation system shall be conveyed to the City.

We are also unable to determine the precise relation which the company expects to bear to the City. The tentative ordinance provides that the company shall be authorized to control and operate the proposed subway system during the five-year construction period provided for in said ordinance and that the company also will undertake to operate said system of local transportation for the City during two successive ten-year periods after the said system shall be completed and ready for operation, if the City shall so desire. Whether the City shall own said subway system during such periods and permit the company to operate the same as agent or lessee of the City or whether said company during such time shall own and operate said system as a public utility company operating in streets and public places of the City under some form of license, permit, or franchise, is not made clear.

The tentative ordinance provides that the work of constructing and equipping said subway system shall be done by the Subway Company and said company shall through the sale of its bonds provide all moneys to pay the cost thereof. All contracts for construction work shall be the company's contracts, and the company shall assume full responsibility for the building of said subway system, the purchase of all existing elevated and surface street railways and any and all other contracts and acts necessary and proper to the acquisition, construction, equipment and unification of a comprehensive system of elevated, surface and subway railways within the period of five years from the passage of the ordinance granting to said company permission and authority to create such local transportation system and obligating the City for the ultimate redemption of the company's bonds and other securities in the manner and to the extent hereinafter described.

A subway commission created under said ordinance shall supervise and inspect the construction of said subway system and approve all plans, specifications and contracts for such

work. As such construction proceeds, said subway commission shall from time to time authorize the company to issue and shall certify to the issuance of bonds of said company in sufficient amounts to pay all the cost of work theretofore done or contracted for and ten per centum of such cost in addition thereto. Said additional ten per centum shall be paid to the company as its remuneration and reward for the financing and construction of said subway system. Inasmuch as the costs of all materials, labor and supplies shall first be paid for out of proceeds of the sale of the company's bonds, this additional ten per centum of said cost is in effect a promoters' and contractors' profit which the company is to obtain for present use by the sale of such additional bonds and which shall be ultimately paid by the redemption of said bonds out of the revenues of the proposed local transportation system. No restraint is placed upon the right of the company to sell its bonds at whatever discount may be deemed necessary by said company except that all such sales and all contracts and expenses to be paid out of the proceeds thereof must be approved by a majority of the subway commission. Said subway commission shall consist of five members; two to be appointed by the City, two by the company and one by the banking group that shall undertake to market the company's bonds.

The bonds so to be issued shall mature sixty years after the issuance thereof, but may be redeemed before that time if the fund to be accumulated for their payment shall be sufficient and the City shall so desire. Said bonds shall be secured by a trust deed or mortgage to be executed by the company to a responsible trust company covering the physical properties of said system of subways and local transportation facilities as the same shall be acquired, constructed and equipped and the revenues to be derived from the operation of said system, and by the contract of the City with the company in respect to the City's Traction Fund, of which contract the chief provisions and obligations are as follows:

First, the City shall agree to place said Traction Fund, accumulated from the City's 55 per cent of the net receipts

of the street railway companies and interest thereon, and also such further payments into said fund as may be made hereafter, in a special fund which shall be held intact and kept safely invested for sixty years or until the amount thereof with interest compounded thereon shall become sufficient to pay off and redeem all outstanding bonds and other securities issued by said Subway Company for the acquisition, construction or equipment of said system of elevated, surface and subway railways. The City Treasurer, with the advice and approval of a board of trustees provided for in the proposed ordinance, shall keep said Traction Fund invested in safe securities bearing interest at not less than four per centum per annum payable semi-annually. When the bonds mature at the end of sixty years, or when prior thereto the amount accumulated shall be sufficient, the City shall cause to be paid to the company out of said accumulated fund a sum equal to all outstanding indebtedness of said company, whether original or refunded, incurred on account of the acquisition, construction or equipment of said local transportation system. The company shall thereupon cause all such indebtedness to be forthwith paid and said mortgage or trust deed and all other liens or claims upon said system to be released and discharged.

Second, the City shall agree to cause all revenues and income of every kind arising from the operation of said subway system or said combined system of elevated, surface and subway railways, as the case may be, to be kept in a special fund out of which shall be paid all operating costs and other charges incidental to the operation of said system, and the balance thereof shall be used to pay the interest on the company's outstanding indebtedness and to further assure the ultimate redemption of securities issued by it on account of the purchase or construction of said subways or other railways.

Third, the City shall agree that the rates of fare to be charged for the services of said system shall at all times be sufficient to pay all operating expenses, including payments

to depreciation and renewal funds and any damages arising to persons or property from the operation of said system and to pay interest on all outstanding securities and indebtedness thereof as the same shall become due and payable.

Representatives of the company have estimated the cost of the proposed subway railway system and its equipment at approximately three hundred million dollars. Using the prices contained in the Municipal Ownership Ordinance, which was offered to the people at the referendum election of April 7, 1925, acquisition of the existing elevated and street railway properties would cost approximately two hundred fifty million dollars more. The Traction Fund, which with its accumulations over a period of sixty years is to be relied upon to ultimately pay for said elevated, surface and subway railways now contains about forty-three million dollars. Inasmuch as the City's total debt-incurring power is much less than the cost of the proposed system and the bonds to be issued in payment therefor, and such power is already near to exhaustion, the first and most important question is whether the bonds of the company, when and if issued, being secured upon and redeemable out of the City's Traction Fund and its accumulations, as above stated, will constitute an indebtedness of the City within the meaning of Section 12, Article IX of the Constitution of 1870, which reads as follows:

“LIMIT OF INDEBTEDNESS—MUNICIPAL CORPORATIONS.)

Section 12. No county, city, township, school district, or other municipal corporation, shall be allowed to become indebted in any manner or for any purpose, to an amount, including existing indebtedness, in the aggregate exceeding five per centum on the value of the taxable property therein, to be ascertained by the last assessment for state and county taxes previous to the incurring of such indebtedness. Any county, city, school district or other municipal corporation incurring any indebtedness as aforesaid, shall before, or at the time of doing so, provide for the collection of a direct annual tax sufficient to pay the interest on such debt as it falls due, and also to pay and discharge the principal thereof within twenty years from the time of contracting the same. This section shall not be construed to

prevent any county, city, township, school district, or other municipal corporation, from issuing their bonds in compliance with any vote of the people which may have been had prior to the adoption of this constitution in pursuance of any law providing therefor."

In *City of Springfield v. Edwards*, 84 Ill. 626, our Supreme Court construed the above quoted section of the Constitution and declared the extent of the prohibition therein contained as follows:

"There is no difficulty in ascertaining the natural signification of the words employed in the clause of the constitution under consideration, and to give them that meaning involves no absurdity or contradiction with other clauses of the constitution. The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay, '*in any manner or for any purpose,*' when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey.

A debt, payable in the future, is, obviously, no less a debt than if payable presently; and a debt payable upon a contingency, as, upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition. If a contract or undertaking contemplates, in any contingency, a liability to pay, when the contingency occurs the liability is absolute—the debt exists—and it differs from a present, unqualified promise to pay, only in the *manner* by which the indebtedness was incurred. And, since the *purpose* of the debt is expressly excluded from consideration, it can make no difference whether the debt be for necessary current expenses, or for something else."

The *Edwards* case has been cited with approval in many later cases (*Culbertson v. City of Fulton*, 127 Ill. 630; *Prince v. City of Quincy*, 128 Ill. 443; *City of Chicago v. McDonald*, 176 Ill. 404; *Lobdell v. City of Chicago*, 227 Ill. 218) and the rule of construction there stated may be deemed the settled law of this state.

In *City of Joliet v. Alexander*, 194 Ill. 457, the City of Joliet owned and operated a system of water works and derived therefrom a net annual income of about \$10,000. The City was indebted in excess of 5 per cent of the value of the taxable property therein. In order to extend its water works system and improve the same an ordinance was passed providing for the issuance of water fund certificates to an amount of not exceeding \$240,000 to be secured by a mortgage upon the water works as extended and improved upon the revenues thereof after payment of operating expenses. The ordinance provided that all the revenues of the water works system were to be paid into a special fund and this fund after payment of necessary operating expenses was to be relied upon to pay both principal and interest of said water certificates. It was expressly provided that the holders of said water certificates should have no right to be paid out of any general fund or funds or any tax moneys belonging to the City. The court in holding such ordinance invalid, and the water certificates, although payable entirely out of said special fund, to be an indebtedness of the City within the meaning of the Constitution, said:

“In addition to mortgaging the existing system, the ordinance proposes to take the income derived from it, amounting to about \$10,000 a year, and devote it to the payment of the certificates. This is existing property and income of the city derived annually from the present system of water-works, independent of the extension and in no manner resulting from or depending upon it. The city is to lose property in the form of established income for the purpose of paying the certificates. If the city, being indebted beyond the constitutional limit, can issue certificates payable out of that fund without creating a debt, it would be equally within its power to issue obligations by pledging the fund derived from dram-shop licenses, or licenses from hackmen, peddlers, theaters or amusements, or any other funds of the city. All of the revenues of the city, except such as would be derived from general taxation, might in that way be pledged or mortgaged for long years to come, and we apprehend that no one would

be found to say that such a scheme would not be a mere evasion of the constitution.

* * * * *

It does not make any difference that the certificates are payable out of the special fund, if the city is the owner of the fund. All its obligations are payable out of some particular fund. The City Council is required, in raising money by taxation, to make appropriations, specifying the objects and purposes for which they are made and the amount appropriated for each object and purpose. The money and appropriation raised for one purpose cannot be applied to any other, and the accounts of each fund and appropriation, and the debts and credits belonging thereto, must be kept in a separate account. The debts chargeable to a particular fund are payable only out of that fund, and it makes no difference what fund they are chargeable to or payable out of, if the fund is one which belongs to the city. (Hurd's Stat., 1899, chap. 24, art. 7, p. 282.) The section of the constitution limiting indebtedness provides that at the time of incurring any indebtedness the city shall provide for the collection of a direct annual tax sufficient to pay the interest on the debt as it falls due and to pay and discharge the principal within twenty years from the time of contracting the debt, and every indebtedness is payable from some particular fund."

The court stated that the only exception to the rule therein laid down would be a strictly purchase money mortgage in which the mortgagee agrees to rely for payment entirely upon the property obtained by the City in return for such mortgaged debt and the revenues of such property. If any property, income or other valuable right already belonging to the City is made part of the security for such mortgage debt the whole indebtedness must be deemed within the purview of the legal provisions limiting the City's debt incurring power to not more than 5 per cent of the taxable property therein and stipulations in the mortgage denying the right of the creditors to seek payment out of any general funds of the City do not place such debts without the limitations of the Constitution. In respect to the exception in favor of such strictly purchase money mortgage the court said (pages 463-464):

“What is said relative to mortgaging property owned by the city or pledging its existing income is not intended to apply to a mortgage purely in the nature of a purchase money mortgage, payable wholly out of the income of property purchased or by resort to such property. This is not a case where there is no obligation of the city except the performance of a duty in the creation and management of a fund, and where the water works, upon paying for themselves, will become the property of the city.”

To the same effect are *Village of East Moline v. Pope*, 224 Ill. 386, and *Lobdell v. City of Chicago*, 227 Ill. 218. In the former case the president and board of trustees of the Village of East Moline, in order to provide for the construction of a municipal water works system, passed an ordinance for the issuance of \$35,000 of village bonds to pay for the proposed plant. The ordinance provided that the bonds were to be secured by a mortgage upon said system and its revenues and by levying an annual tax of not more than one cent on the dollar upon all property within the village limits for the period of fifteen years. The village being already indebted to an amount in excess of 5 per cent of all the taxable property therein, the court held the provisions for said special tax rendered the ordinance void even though said bonds were to be payable entirely out of the revenues of the water works system plus the proceeds of said special tax and were not to be a lien or charge against any general funds of the village.

In the *Lobdell* case it was held that street railway certificates to be issued under the authority of the Mueller Law would constitute a debt of the City within the meaning of the Constitution, because the mortgage securing said certificates contained a contingent grant to the mortgagees of the right to operate the street railways in the city streets in event of foreclosure of said mortgage. The court held the right to so use the streets to be a valuable privilege belonging to the City and not acquired by it from the mortgagees in return for said certificates and that the inclusion of such right in the security given for said certificates made the cer-

tificates an indebtedness of the City and illegal and void for contravention of the limitations upon the City's debt incurring power.

In *Evans v. Holman*, 244 Ill. 596, the court went still further in deciding that any contract or engagement whereby any fund or property belonging to a municipality (except the specific fund or property received in exchange for such contract or engagement or the revenues thereof) is subjected to the payment of any claim or lien is to be considered a debt of the municipality within the meaning of the Constitution.

In that case the Village of Clay City, by an ordinance called Ordinance No. 63, granted to Theodore Fisher the right to construct an electric light plant within said village and to set up and maintain in the streets and public places all necessary poles, wires and other structures for furnishing light, heat and power to the village and its inhabitants for a period of thirty years. At the same time another ordinance was passed, designated Ordinance No. 64, which provided for issuing bonds of the village to the amount of \$4,200 for the purchase of the electric light plant and property, the bonds to show on their face that they were issued to provide money for that purpose. Five per centum of the total taxable property within the village as equalized for the previous year was \$4,200, and that was the limit of indebtedness that could be incurred. Thereafter, before the electric light plant was constructed, a contract was executed between the village and Fisher, by which after reciting that Fisher intended to incorporate a company and convey all his rights and the property to said corporation, and that the corporation, in order to complete construction of said electric light plant, should issue bonds to the amount of \$7,296 secured by a first mortgage on said electric light plant, its poles, wires, fixtures, circuits and appurtenances. Fisher agreed that the corporation should convey all of said property to the village in exchange for said \$4,200 of village bonds, subject, however, to the mortgage debt of \$7,296 and the vil-

lage agreed that it would purchase said property subject to the aforesaid mortgage debt and issue its bonds in payment therefor, but the village was not to assume or agree to pay the mortgage debt. Fisher organized the corporation and conveyed to it all his rights to the electric light plant and the franchise privileges arising from Ordinance No. 63. The corporation completed construction of the plant and issued its bonds to the amount of \$7,296 secured by first mortgage on all its plant and property and then conveyed its right subject to said mortgage to the village in exchange for said \$4,200 of village bonds.

Discussing said ordinance as a plan to evade the constitutional debt limit of the village, the court said (pp. 600-601):

"The two ordinances passed at the same time were but separate parts of one plan, which, together with the contract made a few days afterward, completed the arrangement. The plan was that the village should acquire an electric light plant at the price of \$11,496, issue bonds to the amount of \$4,200 (which was the constitutional limit of indebtedness), and afterward pay \$7,296 as the mortgage indebtedness matured or lose the property. It was provided in the contract for the purchase that the village was not to assume or agree to pay the mortgage indebtedness, but it was none the less an indebtedness of the village, since the property purchased was pledged to pay it. While there must be a debt to constitute a mortgage, there need not be any promise of the mortgagor to pay the debt, and it is not essential that the obligation to pay should be direct. (*City of Joliet v. Alexander*, 194 Ill. 457.) It would be absurd to suppose that the electric light and power company would sell its property to the village for \$4,200 and pay its bonds to the amount of \$7,296, and it is beyond question that it was expected and intended that the village should pay the mortgage debt. The plan was merely a scheme concocted for the purpose of evading the constitution, and devices for that purpose have never succeeded, whether planned with ingenuity or as transparent and shallow as this one."

Since the Traction Fund, which is an existing fund or property of the City, and the interest or income annually

to accrue thereon for a period of sixty years is to be pledged for payment of the cost of the proposed system of elevated, surface and subway railways, we are of the opinion that the entire cost thereof, whether the same be deemed evidenced by the contract of the City with the Subway Company for keeping, accumulating and applying said fund or by the bonds to be issued by the company in payment for said local transportation facilities and the mortgage or trust deed securing the same, would be an indebtedness of the City within the meaning of the constitutional limitation and the proposed contract would be in contravention of such limitation and consequently illegal and void.

Inasmuch as the adverse opinion just stated is conclusive, we have not attempted to discuss in this opinion certain other questions which would require answers in event such constitutional obstacles could be overcome. We suggest, however, that the provisions in the tentative ordinance requiring the City to guarantee rates of fare sufficient at all times to pay operating expenses and interest on all outstanding securities raises an important legal question. As stated above the tentative ordinance is quite general and vague concerning the relations of the City and company and the ownership of the railway system. The Municipal Ownership Act of 1913 puts upon any city owning a public utility the duty of maintaining rates of fare sufficient to pay operating expenses, including payments to renewal and depreciation funds, and to provide for a sinking fund to retire all bonds and securities as the same shall fall due. On the other hand power and authority to determine the rates of fare to be charged by all public utilities not owned by municipalities is by the Public Utility Act of 1921 conferred upon the Illinois Commerce Commission. It is clear, therefore, that if the company should undertake to own the proposed system until the Traction Fund and its accumulations should be sufficient to pay the cost of purchase or construction of said system and to operate the same for a number of years, the City could not undertake to determine the rates of fare to be charged on such system without contravening the powers

of the Illinois Commerce Commission. Assuming the City to become at once the owner of the proposed transportation system, it may also be doubted whether the provision for paying to the company a contractor's or promoter's profit of 10 per cent of the cost of purchase or construction will contravene the terms of the Municipal Ownership Act concerning the total amount of indebtedness that may be lawfully incurred in exchange for any specific plant or other article of public utility property. The final paragraph of the tentative ordinance provides that said ordinance shall take effect without submission to the people at a referendum election. The Municipal Ownership Act of 1913 specifically requires that any ordinance providing for the acquisition and operation of a public utility by a city or other municipality shall be submitted to the people at such referendum election.

Respectfully submitted,

C. MORTON DOTY,

WILLIAM J. TUOHY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Frontage Consents in Residential District for Branch Packing Plant.

September 1, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of August 27th.

The facts briefly are that an application has been made to you for a permit to erect a branch house for the Cudahy

Packing Company at 1804-06, etc., Lawrence avenue, which is in a district zoned for manufacturing purposes and adjacent to a commercial district. The location is on the north side of the street, and all the buildings in the block on the south side of the street are devoted exclusively to residence purposes. We assume from your letter that the buildings which are used exclusively for residential purposes are one-half of the total number of buildings in the block.

The proposed building, you state, will be used in small part for the smoking and curing of meats and will have a large cooling plant and that it may also be classed as a warehouse.

I am informed that meat will be delivered and sold from the proposed branch house by means of wagons calling at the said branch house for such meat, and that the said branch house of the Cudahy Packing Company will do the same business as is customarily done by such branch houses.

You wish to be advised whether the occupation of the proposed building comes within the provisions of Section 921 of The Chicago Municipal Code of 1922. Section 921 reads as follows:

“921. FRONTAGE CONSENTS—WHERE REQUIRED—USES OF PROPERTY FOR WHICH REQUIRED—CONSENT IN WRITING.) It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building, structure or place used for a gas reservoir, manufacture of gas, stock yards, slaughter house, *packing house, smoke house or place where fish or meats are smoked or cured*, soap factory, glue factory, size or gelatine manufactory, renderies, fertilizer manufactory, tannery, storing or scraping of raw hides or skins, lime kiln, cement or plaster of paris manufactory, oil cloth or linoleum manufactory, rubber manufacture from the crude material, saw or planing mill, wood working establishment, starch factory, glucose or dextrine manufactory, textile factory, laundry run by machinery, factory combined with

a foundry, iron or steel works, brass or copper works, sheet metal works, blacksmithing or horseshoeing shop, boiler making, foundry, smelter, metal refinery, machine shop, stone or monument works run by machinery, asphalt manufacture or refining, paint or varnish factory, oil or turpentine factory, printing ink factory, tar distillation or manufacture, tar roofing, tar paper or tarred fabric manufactory, ammonia, chlorine or bleaching powder factory, celluloid manufactory, place for the distillation of wood or bones, lamp black factory, sulphurous acid, sulphuric acid, nitric or hydrochloric acid manufacture, factories or other manufacturing establishments using machinery or emitting offensive or noxious fumes, odors or noises, storage warehouses, storing or baling of junk or scrap paper or rags, shoddy manufacture or wool scouring, second-hand store or yard, incineration or reduction of garbage, offal, dead animals or refuse, stable for more than five horses, medical dispensary, livery stable, sale stable, boarding stable, without the written consent of a majority of the property owners according to frontage on both sides of such street or alley. Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction or alteration of any building, structure or place for any of the above purposes; provided, that, in determining whether one-half of the buildings on both sides of the street are used exclusively for residence purposes, any building fronting upon another street and located upon a corner lot shall not be considered."

The proposed structure will be a branch house of the Cudahy Packing Company. Will it be a building used for a "packing house," or "smoke house or place where meats are smoked or cured" within the meaning of Section 921?

At to what is a "packing house" has been defined as follows:

"Packing houses are houses used for the purpose of packing meats."

Ford v. State, 14 N. E. 241-244; 112 Ind. 373.

"It is a matter of common knowledge that a part of the business of a packing house consists in the sale of products which it prepared for this purpose. It would

be sticking in the bark to hold that a firm is doing a packing house business when it is engaged in slaughtering animals and dressing and preparing the products of their carcasses for food and other commercial purposes, but it is not carrying on a packing house business when it is selling fresh, cured and salt meats, and other products that it has manufactured from the carcasses of slaughtered animals for this very purpose."

Stewart v. Kehrer, 41 S. E. 680-682; 115 Ga. 184.

In consideration of the above, we cannot but understand that the proposed building is one that will be used for a packing house as such term is generally understood, but also from what you say in your letter as a "building used for a smoke house or place where meats are smoked or cured."

That being our understanding of the matter, then the next question that arises is whether or not frontage consents may be lawfully dispensed with under the circumstances of this particular case?

You state in your letter the following:

"There are extenuating circumstances surrounding the location where said building is to be placed that give it certain rights. It will be adjacent to a railway system and there are now switching facilities on the ground where the building is to be erected. A number of large industries are in close proximity to said proposed structure. The residences located on the south side of the street in this block constitute old frame structures that have been there for perhaps twenty-five years, and owing to the present value of real estate at that point there is every reason to believe that the greater number of said buildings will be replaced by large industrial or commercial buildings in the very near future."

While from the facts outlined by you it would seem that without doubt the proposed location would be a desirable one from the standpoint of the Cudahy Packing Company for its branch house, yet we do not believe that these facts can be taken into consideration for the purpose of waiving the provisions of Section 921.

It is true that the proposed location is in a manufacturing district, but the Zoning Ordinance specifically provides as follows:

“Section 33. EFFECT ON PRESENT ORDINANCES. This ordinance shall not be construed as repealing or modifying any valid ordinances of the City of Chicago now in effect which restrict the location of industries, entertainments, occupations, establishments or enterprises of any kind, either by requiring frontage consents from property owners or residents affected by such location, or by prohibiting or restricting the location of same within a fixed distance from a hospital, church, public school or parochial school, or the grounds thereof, or on or near any class of streets or boulevards or any parks, playgrounds or bathing beaches. As to all other ordinances or parts of ordinances in conflict with any of the provisions of this ordinance, the same are hereby repealed.”

Not only has Section 921 never been repealed, but Section 33 of the Zoning Ordinance specifically provides that it shall not be repealed because of said Zoning Ordinance.

So that the fact that the proposed location of the branch house is in a manufacturing district or that residences across the street therefrom are old frame structures that will probably soon be replaced by commercial establishments would have no bearing on the situation. So long as the said frame buildings, used exclusively for residence purposes, remain where they are, the owners thereof have it within their power to waive or not to waive the prohibition contained in the ordinance which was established for their benefit and comfort.

In view of all of the above, we are obliged to advise you that if one-half of the buildings in the block in which it is proposed to construct the said branch house of the Cudahy Packing Company are used exclusively for residence purposes and if the proposed branch house of the Cudahy Packing Company will be a building used for a “packing house” or “smoke house or place where meats are smoked or cured,” as we understand it will be from the information furnished

us, then frontage consents are required as prescribed by the ordinance.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Closing of Meat Markets on Sunday.

September 8, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We are in receipt of your letter of September 1, 1925, in which you ask for an interpretation of the new paragraph which was added to Section 2017 of The Chicago Municipal Code of 1922, as amended, by an amendatory ordinance passed July 15, 1925. (See page 995 of the Journal of the Proceedings of the City Council for that date.) Said additional paragraph reads as follows:

“2017. SANITARY METHODS REQUIRED. SALES ON SUNDAY PROHIBITED.) In order to insure inspection and thereby prevent the sale of unwholesome and tainted meats, it shall be unlawful for any person, firm or corporation to keep open, or conduct any meat market, or to expose or offer for sale therein, any fresh meats on the first day of the week, commonly called ‘Sunday,’ provided that this section shall not be applicable to persons who observe some other day of the week as the Sabbath, but that in such cases, such persons shall be required by the Department of Health to make suitable arrangements as to inspection.”

In your letter you state that,

“The Department of Health in enforcing this ordinance has been confronted with the matter of the so-called combination grocery and meat market being open on Sunday. It is being contended in some cases that the grocery section of the premises may be kept open, if no fresh meats are sold, which, of course, allows the entrance to the meat market to be open also.”

As we understand it, a combination grocery and meat market is an establishment in which groceries and fresh meats are sold at retail in different departments or sections of the same building or room, not, however, being separated by any wall or partition. In the ordinary case a single door or entrance affords access to the room in which both departments are conducted, and the closing and locking of such door would prevent the conduct of either business. It is, however, possible to allow persons to come into such room for one class of trade or business and to refuse to deal with them in respect to the other class of business.

Your letter states that it is contended that the grocery sections of such places may be kept open on Sunday if no fresh meats are sold. It is that contention upon which you wish us to render an opinion. We must assume, therefore, that those who desire to keep open and operate such grocery sections and who make that contention will honestly endeavor to obey the ordinance, if so interpreted; that they will keep the section or department devoted to the sale of meats closed on Sunday; and will take care to inform patrons and customers that no fresh meats can be bought or obtained on that day. The question, therefore, is whether the physical access to such an establishment afforded by carrying on the business of the grocery section amounts to keeping open or conducting a meat market within the meaning of the prohibitory ordinance above quoted.

The ordinance under consideration is a penal ordinance. Penal ordinances, like penal statutes, are strictly construed. They are not to be extended by implication and are limited in their application to cases clearly described by the

language employed. (19 R. C. L., par. 115; McQuillin, Mun. Corps., Vol. 2, Par. 815; *Chicago v. Rumpff*, 45 Ill. 90.)

The Century Dictionary defines the word "conduct" in relation to business enterprises to mean, "to direct the course of; manage; administer; carry on." To conduct a meat market, therefore, would be to actively manage or carry on the business of such market. So it is clear that the condition described by your letter does not include the active management or operation or carrying on of the business of such market nor the conducting of such market in the usual sense of that term. It is also part of the hypothesis stated in your letter that no fresh meats shall be sold or offered or exposed for sale on such premises on Sunday. All that is left then is to determine the meaning and scope of the expression, "to keep open * * * any meat market," as the same is used in the ordinance.

The phrase "to keep open," when used in statutes or ordinances prohibiting certain businesses to be carried on during certain hours of the day or night, or on specified days, has been frequently defined and interpreted by the courts of this state. It has therefore acquired a definite legal meaning, and, in the absence of anything in the context of the ordinance taken as a whole to indicate that the City Council used said phrase in this ordinance in a sense other or different from that ordinarily attached to it, we must assume the usual legal meaning to have been the one intended. (Lewis Sutherland on Statutory Construction, Vol. 2, Par. 389.)

In *Patten v. City of Centralia*, 47 Ill. 370, the court construed an ordinance of the City of Centralia forbidding any person to keep open a tippling house on the Sabbath day, and said (p. 371):

"Merely opening the door of a tippling house on Sunday would not constitute the offense aimed at by this ordinance. It must be kept open, as on week days, for tippling purposes, and nothing of that kind was proved in the case.

It was erroneous, also, to modify defendant's second instruction. As asked, it was as follows: Unless you are satisfied from the evidence that the room called the saloon was a place where the defendant kept spirituous liquors for sale by the small quantity, you should find the defendant not guilty.

The court modified this instruction by adding, after the words, spirituous liquors, the words, 'or other drinks.' By this instruction, as modified, if soda water, sarsaparilla, or any other cooling or refreshing drink, not spirituous, were sold, the vendor could not escape conviction. He would be equally liable to punishment with the vendor of whiskey or other spirituous beverages. Such is not the law.

To constitute a tippling house, it is necessary that intoxicating drinks should be sold therein."

In *Koop v. The People*, 47 Ill. 327, the court construed the state statute against keeping open tippling houses on the Sabbath day, and said (p. 329):

"To establish the offense charged, it was only necessary for the prosecution to show that the defendant kept a beer saloon, where beer was sold by the glass or 'drink,' that to this saloon the public had free access on the Sabbath day as on week days, and every facility afforded those who might enter to obtain their favorite 'tipple.'" (Italics ours.)

To the same effect are *Purefoy v. The People*, 65 Ill. App. 167, wherein it was held that opening a saloon to change the fixtures did not violate the statute against keeping open a tippling house on Sunday, even though the workmen were supplied with drinks while working, and in *Wiedman v. The People*, 7 Ill. App. 38, wherein the court in discussing the same offense said (p. 39):

"In order to constitute the offense, it must appear that the keeping open was for tippling purposes—merely opening the house and allowing persons to resort there, no tippling being intended or permitted, would not be enough." (Italics ours.)

In *Kroer v. The People*, 78 Ill. 294, the court said (p. 298):

“We understand that a tippling house will be kept open on the Sabbath day, within the meaning of the statute, *where it is so kept that access may be had thereto on the Sabbath day, and facility afforded for the obtaining of intoxicating drinks.*”

In view of these decisions as to what constituted the keeping open of tippling houses on Sunday in violation of prohibitory statutes and ordinances (and we are constrained to believe that the ordinance under consideration will not be construed to operate more drastically on the retailers of fresh meats than the statutes and ordinances therein concerned were held to regulate and control the proprietors of tippling houses), we are of the opinion that to contravene the requirements of said ordinance against keeping open a meat market on Sunday it is necessary to show either that fresh meats were sold therein in violation of the ordinance or that the proprietor so conducted himself as to indicate a willingness and readiness to accommodate those who should come into the place desiring to purchase fresh meats. The honest and bona fide operation of the grocery section alone of a combination grocery and meat market, no fresh meats being sold or offered for sale therein, is not in our opinion a violation of the ordinance.

There are a number of cases in this state which hold that the keeping open after midnight on Sunday of a room in which a saloon or barroom is operated constitutes a violation of an ordinance which specifically requires such places to be closed at such times. These decisions can be clearly distinguished, however, as coming within the rule that when the power to suppress or prohibit a business is given to the municipality it may impose such restrictions as it sees fit.

Very truly yours,

C. MORTON DOTY,
WILLIAM J. TUOHY,

Approved:

Assistant Corporation Counsel.

LEON HORNSTEIN,
Acting Corporation Counsel.

Lumber Yard License.

Chicago, Sept. 9, 1925.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

In your letter of recent date concerning the licensing of lumber yards you ask whether a person engaged in the lumber business but having no yard of his own is liable for the license fee provided by Section 2456 of The Chicago Municipal Code of 1922.

It appears from your letter that the person you speak of is engaged in the business of buying and selling lumber, and transacts his business from his home; that he has no yard of his own at which he stores his lumber, but occasionally it becomes necessary for him to store a quantity of lumber which he has purchased in some yard or yards which have already been licensed by the City of Chicago.

We do not believe that a person situated as you say should be required to take out a license for his business under Section 2456 of the code. That section is limited to persons, firms or corporations that "keep, carry on, conduct or maintain a lumber yard or other place where lumber is sold from yard, car, vessel or place, or where lumber is stored for the purpose of seasoning or drying the same, or where second-hand lumber is stored or kept for sale," or that keeps a box yard, as defined in another section of the ordinance. The party described by you does not keep, carry on or maintain such a yard or place. Consequently, he is not amenable to this provision of the ordinance.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

Distribution of Circular Concerning Cure of Diseases.

September 11, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of September 8, 1925, with enclosure, has been assigned to the writer for attention.

You wish to be informed as to whether the circular you placed before us, and which was circulated in the vicinity of 500 East 36th street, constitutes a violation of the ordinances of the City of Chicago. One side of the circular declares that the advice of one Dr. Bennett, whose office hours, address and telephone number are given, will effectively cure certain diseases that are enumerated, and the presumable symptoms of the diseases to be cured are stated, and that his "charges are reasonable with easy payment plan."

The reverse side of the circular carries the caption "Social Diseases," and gives an enumeration of diseases which are characterized as "these terrible diseases," and further that his "22 years experience is your guarantee of the best care and latest methods for treating social diseases and their complications."

Section 2672 of The Chicago Municipal Code states that "No person shall * * * distribute or have in his possession with intent to give away, sell or distribute in or upon any street, sidewalk, park or public property in the city, any * * * pamphlet, circular * * * or notice of any kind giving or purporting to give information from whom or where medicine or anything whatever may be obtained for the cure, prevention or treatment of * * * venereal diseases."

Obviously, the purpose of the circular is to dispense information from whom and where medicine to cure or prevent venereal diseases may be obtained.

It is therefore our opinion that the circular that you handed us violates the section of The Chicago Municipal Code which we have quoted, and that all persons distributing or aiding in the distribution of the said circular in or upon any street, sidewalk, park or public property in the City should be prosecuted under the above section of the code.

Very truly yours,

BARNETT HODES,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Transfer of Appropriation Made for Board of Local
Improvements to Department of Gas and
Electricity.**

September 14, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Alderman:

We have your communication of August 26th to which you attached request addressed to you from the Department of Gas and Electricity to transfer to said department the sum of \$10,000 from the Board of Local Improvements 5 per cent special assessment funds as an additional amount necessary to complete the moving of electric light poles, fire alarm boxes and other equipment in connection with special assessment improvements.

You ask this office to advise your committee what action can be taken by the City Council concerning this matter at this time.

Reference to Section 94 of "An Act concerning local improvements," Chapter 24 of the Illinois Revised Statutes

sets forth the specific use which the City can make of the 5 per centum of special assessment funds as follows:

“Provided, further, that in cities, towns or villages of this state having a population of one hundred thousand or more inhabitants by the last preceding census of the United States, or of this state, the city, village or town, as the case may be, may in and by the ordinance providing for the assessment prescribed, provide that a certain sum not to exceed 5 per centum of the amount of such assessment, as finally determined after the completion of the improvement in accordance with Section 84 of this act, shall be applied (but only by way of reimbursement of the general corporate fund, as hereinafter in this section provided) toward the payment of the cost of making, levying and collecting such special assessment or special tax, and of letting and executing contracts, advertising, clerical hire, engineering and inspection, court costs and fees of commissioners in condemnation proceedings incurred in such proceedings and deficiency in interest in the matter of such special assessment or special tax.”

Excerpt from said Section 94 designated as Par. 226 of the General Act for Incorporation of Cities and Villages, Cahill's 1923 Rev. St.

Very clearly has a limitation been placed upon this 5 per centum fund which precludes the use or transfer of funds from this fund for any other purpose. We cannot reconcile the type of work intended to be accomplished by the Department of Gas and Electricity as coming within the purview of the above quoted section, and any such expenditure therefrom would be considered invalid.

It will therefore be necessary for other financial arrangements to be thought out to meet the situation referred to.

Yours truly,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Conversion of Residence into Undertaking Establishment—Necessity for Frontage Consents.

September 14, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of September 12th requesting the views of this department.

It is proposed to convert a residence at 1861 West 95th street into an undertaking establishment. There are only three buildings in the block on both sides of the street, to wit:

- (a) The residence to be converted into an undertaking establishment,
- (b) Church,
- (c) A real estate office.

Section 1902 of The Chicago Municipal Code of 1922, as amended June 3, 1925, reads as follows:

“It shall be unlawful for any person, firm or corporation to locate or establish hereafter any morgue or undertaking business in connection with which the body of any dead person shall be received for embalming or other purposes on or along any boulevard or pleasure driveway, or in any block in any street in which one-third of the buildings on both sides of the street in such block are used exclusively for residential purposes, without the written consent of a majority of the property-owners according to the frontage on both sides of the boulevard, pleasure driveway or street in the block in which it is proposed to locate such morgue or undertaking business. But nothing herein contained shall apply to any block in any street in which street cars are operated. Frontage consents, when required under this section, shall be obtained and filed with the department of health before a license shall issue for such morgue or undertaking business.”

As it is evident that the church and real estate office are not buildings used exclusively for residential purposes

within the meaning of the above ordinance, the question that presents itself is whether the residence which is to be converted into an undertaking establishment should be considered in determining whether one-third of the buildings in the block are used exclusively for residence purposes.

In the case of the *City of Chicago v. Stratton*, 162 Ill. 501, a leading case on the subject of frontage consent ordinances, the Illinois Supreme Court used the following language:

“While it may be true, that a livery stable in a city or town is not *per se* a nuisance, ‘yet it becomes so if so kept or used as to destroy the comfort of owners and occupants of adjacent premises, and so as to impair the value of their property.’ (13 Am. & Eng. Ency. of Law, p. 935.) A livery stable in close proximity to an existing residence may be injurious to the comfort and even health of the occupants by the permeation of deleterious gases and by the near deposit of offal removed therefrom. (*Shiras v. Olinger*, 50 Iowa, 571; 32 Am. Rep., 138, and note.) As cities are constructed, the division of the territory is into blocks bounded by streets. The persons, who will be injuriously affected by a livery stable, so kept as to be a nuisance, are those whose residences are in the same block where the stable is located. *The prohibition against the location of a stable in a residence block is for the benefit of those who reside there.* If those for whose benefit the prohibition is created make no objection to the location of such a stable in their midst, an enforcement of the prohibition as to that block would seem to be unnecessary.

By Section 49 the lot owners are not clothed with the power to locate livery stables, but are merely given the privilege of consenting that an existing ordinance against the location of a livery stable in such a block as theirs may not be enforced as against their block. They are simply allowed to waive the right to insist upon the enforcement of a legal prohibition which was adopted for their benefit and comfort.”

As stated by the court, the prohibition contained in the ordinance is for the benefit of those who reside there. What applies to a stable regarding the prohibition would apply by analogy to a similar prohibition regarding an undertaking establishment.

The owner of the residence at 1861 West 95th street desires to convert the same into an undertaking establishment. When this residence is converted into an undertaking establishment, there will be no residences in the block. So the protection the ordinance seeks to give is then not necessary—its purpose being to protect the residences in the block, and there being no residences in the block, it follows the ordinance would have no application to such block.

We are therefore clearly of the opinion that the residence which is to be converted into an undertaking establishment should not be considered in determining whether or not frontage consents are necessary. That being the case, one-third of the buildings in the block are not used exclusively for residence purposes.

The only other question which arises is whether 95th street is a boulevard or pleasure driveway. Obviously, it is not a boulevard as that term is understood. It is not under the jurisdiction of any of the park boards as far as we are advised. Besides, it is zoned for commercial purposes. While this would not be controlling, yet it would be a circumstance to show that 95th street is not to be regarded as a pleasure driveway.

It is indeed a matter of common knowledge that 95th street is one of the main arteries in the south division of the City for motor trucks and other heavy traffic of various kinds, and there is no law that we are advised of prohibiting such heavy traffic from utilizing 95th street; 95th street, we feel, is not a boulevard or pleasure driveway within the meaning of Section 1902.

We are of the opinion that frontage consents are not required under the circumstances of this case for the conversion of this residence into an undertaking establishment.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

**Advertising Tea Room from Automobile Standing in
Front of Place.**

September 18, 1925.

HON. SAMUEL E. PINCUS, Prosecuting Attorney.

Dear Sir:

We have your letter, to which you attached letter from Edwin L. Weisl, an attorney-at-law, setting forth at length a situation complained of by him because of an interpretation by the Department of Police of Section 3735 of The Chicago Municipal Code of 1922, which would prevent his client, Herman Becker, from advertising from his automobile the Kelshore Tea Room.

Said Section 3735, as amended, reads:

“UNLAWFUL TO MAINTAIN STANDS ON STREET OR SIDEWALK.) It shall be unlawful for any person, firm or corporation to erect, place or maintain in, upon or over any street, alley, sidewalk or other public place in the City of Chicago, any fruit stand, shoe shining stand, flower stand, vegetable stand, lunch wagon, table, box, bin or any other arrangement or structure for the display or sale of goods, wares or merchandise, or for the pursuit of any occupation whatsoever, unless a permit for the same shall be obtained from the Commissioner of Compensation; provided, that the Commissioner of Compensation shall issue no such permits except for the purpose of exhibiting for sale daily newspapers, within the district bounded on the north by the Chicago River; on the south by the south line of Roosevelt road; on the east by Lake Michigan and on the west by the Chicago River.”

The fact that Mr. Becker believes it to be of commercial advantage to have his automobile standing in front of his place of business with advertising signs thereon cannot, in our opinion, be prevented or prohibited by the Department

of Police under the provisions of this section. We agree with counsel who protests against police interference that this sort of regulation was not contemplated by the City Council when it passed the ordinance above set forth.

Your office is therefore instructed to advise the Department of Police that it should not make arrests in instances of this nature under Section 3735.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Individual Towels in Public Lavatories—Packing
Plant Lavatory Within Provisions of
Ordinance.**

September 21, 1925.

HON. HERMAN N. BUNDESEN, Commissioner of Health.

Dear Sir:

Your communication of August 26, 1925, with enclosure, has been assigned to the writer for attention.

Your inform us that the G. H. Hammond Company, which is located in the stock yards and which is one of the subsidiary companies of Swift & Company, has been asked to appear before you for violating Section 2252 of The Chicago Municipal Code of 1922, which is in words and figures as follows:

“2252. TOWELS IN PUBLIC LAVATORY.) No person, firm or corporation owning, in charge of, or in control of, any public lavatory or washroom shall maintain in or about such lavatory or washroom any towel for common use.

The term 'common use' as used in this section shall be construed to mean for use by more than one person."

Your department contends that instead of the roller towels now used in the lavatories of the G. H. Hammond Company, compliance with the provisions of the above ordinance requires that individual towels should be supplied.

You further advise us that the G. H. Hammond Company state that the lavatories in question are not public in that they are not open to the general public, but on the contrary are used exclusively by the employes of their organization, and as a consequence thereof there is no violation by them of this ordinance.

You wish to be advised by us whether or not under the section of the ordinance heretofore recited the G. H. Hammond Company is required to maintain individual towels instead of the roller towels now in use by them.

It is definitely settled in this State that the most important of police powers is that of caring for the health of the community. Ordinances predicated upon this proposition and having the preservation of health as their aim have been constantly held valid.

Cahill's Illinois Revised Statutes, 1921, Chapter XXIV, Article V, Section 1, gives the City the following power:

Clause 78. To do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.

In *Gundling v. City of Chicago*, 176 Ill. 340, there is a reference to the clause hereinabove mentioned and a declaration by the court as follows:

"* * * paragraph 78 is an express authorization of the City Council to make all regulations necessary or expedient for the promotion of health or the suppression of disease * * * express authority is granted the municipality to pass all ordinances or requirements tending to promote the public health, morals, security, comfort and welfare of the community. Such legisla-

tion is included within the provisions authorizing the enactment of police regulations. The most important of police powers is that of caring for the health of the community, and that is inherent in a municipality, and may be exercised whether expressly granted or not, because the preservation of the health of the public is indispensable to the existence of the municipal corporation."

Clearly, the ordinance here involved was passed for the purpose of promoting health and suppressing disease, and there can be no question of the power of the City Council to pass an ordinance of this character.

The only question presenting itself, therefore, is as to whether the lavatories or washrooms of the G. H. Hammond Company are *public* under the meaning of the ordinance, as the gravamen of the offense is that the lavatory in which the towel is maintained for common use shall be a *public* lavatory. In the case of *Irvin v. The Commonwealth*, 124 Va. 817, where a somewhat similar question was presented, the court stated, page 819:

"A public lavatory * * * is one that is open to all who may choose to use it. As, for example, lavatories in railway trains or steamboats, which are provided and kept open for the use and convenience of all of the public who travel thereon; or in buildings to which the public generally have a right to resort, and which are equipped with open lavatories for their use.

Some of the definitions given by Black and other legal lexicographers of the word 'public' are: 'Pertaining to or affecting the whole body of people, or an entire community'; 'open or common to all; general; open to common use,' and the like. Black's Law Dictionary (2d ed.), p. 964, and authorities cited."

In the case of *City of Chicago v. McGuire*, 185 Ill. App. 589, the court passed upon the very ordinance in question. In the *McGuire* case the defendant was charged with maintaining roller towels for the common use of guests in a lavatory or washroom in his lodging house. The Appellate Court stated in its opinion that the material facts in this case are:

“that defendant in error owns, maintains, operates and has under his control a lodging house in the City of Chicago, on the third, fourth and fifth floors of which he maintains roller towels for the use of men guests, and refused and failed to discontinue their use during a certain period while the ordinance was in effect; that on each floor are one hundred compartments, in use more or less, and a lavatory or washroom to which only those have access who have registered and paid their bills; that any man applying for lodging and paying therefor will be accommodated if not intoxicated or apparently afflicted with disease,”

basing the following conclusion upon the above stated facts:

“* * * the roller towels were for the common use of all guests on the same floor, and * * * the accommodations were open to the public with only such restrictions as are generally applicable to hotels, inns and other similar public places. It was said in *Shaw v. Carpenter*, 54 Vt. 155, 161, that whether a place is a place of public resort must depend upon the evidence which gives character to the place; and in *Parker v. State*, 26 Tex. 204, that a public place does not mean a place devoted solely to the uses of the public, but it means a place, which is in point of fact, public as distinguished from private, a place that is visited by many persons, and usually accessible to the neighboring public. In defining a public place, such as would render a nuisance therein a public nuisance, it is said to be a place ‘where members of the public are likely to come within the range of its influence.’ (16 Am. & Eng. Ency. of Law, 926.) Interpreted in this relative sense, we think the term ‘public,’ is properly applicable to a lodging house conducted in the manner above stated and a lavatory as therein maintained.”

The true intent of the ordinance, gathered from the words, the context and the subject-matter, is not difficult to indubitably ascertain. There is nothing doubtful or ambiguous in its terms. Obviously, the purpose of this ordinance is to prevent a common use of a towel by a large number of persons, the ordinance itself declaring that “the term ‘common use’ as used in this section shall be construed to mean *for use by more than one person.*”

The *McGuire* case heretofore quoted states clearly "that a public place does not mean a place devoted solely to the uses of the public, but it means a place which is in point of fact public as distinguished from private—a *place that is visited by many persons.*" The definition of public as "open or common to all; general; open to common use" has long been established.

The lavatories and washrooms of the G. H. Hammond Company are visited by many persons and open to common use and therefore are public.

It is our opinion that the lavatories and washrooms of the G. H. Hammond Company are public lavatories within the meaning of the provision of Section 2252 of The Chicago Municipal Code.

Very truly yours,

BARNETT HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

City's Claim Against West Chicago Park Commissioners.

September 22, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your request to be advised as to what you should do in pursuance of the order passed by the City Council relative to the settlement of claims against the West Chicago Park Commissioners was referred to the undersigned for consideration and reply.

On March 11, 1925 (Council Journal, p. 1054) the City Council passed an order authorizing the Commissioner of Public Works to negotiate with the West Chicago Park Commissioners for the purpose of setting off the charge of \$11,819.94 covering the cost of replacing pavement on Washington boulevard from Ashland avenue to Western avenue, in connection with the relaying of the city water main in that street in 1924, against claims of the City of Chicago for sundry services rendered and covered by warrants for collection already issued, and also authorizing the City Comptroller to make such entries or credits on the City's warrants when agreed upon. This order was passed after requests were made by the Commissioner of Public Works concerning the claims of the Park Commissioners against the City.

You state in your letter that this order imposes somewhat unusual duties on your department, and that it involves claims and proceedings that were referred to the Law Department in 1920, some of such claims dating back as far as 1914. From this you gather that your department is coming in very late with respect to old matters to be used as set-offs against new claims of the Park Commissioners.

We have examined into the matters in dispute only to the extent of ascertaining in a general way what the present status is. We are convinced from such examination that these claims and counterclaims are not of such a nature that you will be able to handle them through your department. They are matters which can only be disposed of through the Comptroller or the Corporation Counsel, and will require final action on the part of the City Council unless everything is allowed to go to judgment.

The City has on its books a large number of charges against the West Chicago Park Commissioners on account of special assessments. Some of these date back as far as 1890. They amount to a great deal of money. A statement prepared by the City Comptroller on November 1, 1921, showed a principal sum of \$171,934.17 and interest and costs

amounting to \$236,724.42, or a total of \$408,658.59. By this time these amounts, of course, have run up considerably beyond that.

Another series of claims of the City of Chicago against the West Chicago Park Commissioners relates to the street lighting service. It would seem from the data before us that these claims had their inception in the turning over of streets to the Park Commissioners on which the lighting system was already installed. The City kept on furnishing electricity and the bills that grew out of them amounted to a considerable sum.

So far as the special assessment claims are concerned, they have been the subject of a great deal of controversy, agitation and even legislation. The Corporation Counsel on July 1, 1907 (Council Journal, pp. 841-843), rendered an opinion to the City Council that under the decision of *West Chicago Park Commissioners v. City of Chicago*, 152 Ill. 392, no collection could be made of special assessment claims of the City against the Park Commissioners. At a subsequent date, after much controversy, a statute was passed authorizing park boards to pay debts incurred by agreement on account of street improvements from the proceeds of sales of bonds, and authorizing the payment of \$100,000. This statute was passed in 1909. While the writer has no independent recollection of this, it would seem as though it was passed for the express purpose of enabling the City and the West Chicago Park Commissioners to settle their differences. In any event, the question of such settlement came up in 1911, and an opinion was rendered to the effect that such payment could legally be made. (See opinions of Corporation Counsel from April 1, 1911, to December 31, 1912, p. 1228.) After that negotiations were had from time to time, but nothing ever came of the matter. From such investigation as we have made, it would seem that at one time the bonds were refused on the ground that they were selling below par. To proceed any farther in giving information along this line would require a very elaborate and extended opinion, which

we believe you are not calling for, and which would not serve any useful purpose.

As to the bills growing out of the electric light claims, suit was started thereon June 14, 1917. The amount of such claims is stated to be \$53,989.22, but these include some small items that accrued since suit was started. The three bills for 1914, '15 and '16 were respectively, according to our records, \$14,572.52, \$17,635.89 and \$13,404.93. It was probably understood at the time suit was started that efforts would be made to settle the case. At any rate, it appears that negotiations were had from time to time until some time in 1922. The last thing that was done on this matter, so far as we can ascertain, was on March 9, 1922, when the Commissioner of Gas and Electricity addressed a letter to the Corporation Counsel, stating, among other things, that there had been negotiations, that an understanding was arrived at with the West Chicago Park Commissioners, under which a committee of three of their members was to be appointed to confer with the Corporation Counsel with regard to the legal liability of the board, with the further understanding that if they could come to no agreement a statement of facts would be presented to the court in the case then pending. Nothing else appears to have been done in the matter, although, under date of January 23, 1924, there appears a notation on one of the letters of the business agent, in which notation the Comptroller says that satisfactory arrangements had been made to pay all bills owed by the board, with the exception of the items in litigation. We conclude from this notation that the negotiations must have fallen through, and therefore this case will be revived and we will proceed and attempt to collect what is due the City for the lighting service.

It would seem as though this matter was one which should be settled, and that negotiations looking to settlement ought to be taken up again. Nevertheless, it is hard to arrive at any satisfactory conclusion when cases of this kind are taken up for settlement with public bodies. Ordinarily,

they drag along until there is a change of administration on the part of one or the other, and then they lapse and are lost sight of. The only thing that we can do is to push the case that has been started, and we will endeavor to do this.

If there are to be any further negotiations with regard to the payment of special assessment claims, they will have to be started on the order of the City Council, in order to give them that official standing that they had at one time in the course of the negotiations that were entered into before.

You will readily see, from the above explanation, which is long and yet covers only the salient features of a series of transactions and negotiations, that your department has nothing to do with any of the matters involved. They arise out of special assessments and out of bills rendered by the Department of Gas and Electricity. Consequently, if there is to be any effort made at settlement, so that the bills due from the City shall be offset against the bills of the West Chicago Park Commissioners, it would more properly come within the jurisdiction of other departments.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Wheel Tax Fund for Resurfacing Streets.

September 23, 1925.

HON. JOHN S. CLARK, Alderman, 30th Ward.

Dear Sir:

In your letter of recent date you stated that it was your understanding that an opinion had been asked of us by

the Commissioner of Public Works relative to the use of moneys from the Wheel Tax Fund for the resurfacing of Madison street from Crawford avenue to Cicero avenue. No such opinion has been called for, because it seems that the work is being done by the Board of Local Improvements. Therefore, while the Department of Public Works has not placed the matter before us, we will nevertheless endeavor to answer the questions which have arisen concerning the use of such money.

The power under which the City accumulates a wheel tax fund authorizes its use for "paying the cost and expenses of street or alley improvement or repair." This is a broad provision, which makes it possible to use the money for practically any purpose connected with street paving work, including new paving. It can be used for building new pavements in territory which is not yet settled, where such improvement partakes of the nature of a country highway and it would be inequitable to assess the cost on the adjacent property owners; and it can be used to defray the City's part of the cost of a new pavement laid by the Board of Local Improvements. In other words, it can be used to pay the assessment against the City for public benefits. That it has not been so used is probably due to the fact that it is exhausted in the making of street repairs, and it is inadequate for that purpose. If any part of it were used to pay for public benefits on local improvements it would be necessary to draw just so much more from the general corporate fund for street repairs.

It was conceived a number of years ago that if the City Council were given authority to use the vehicle tax fund for one-half of the cost of resurfacing a street and to spread an assessment on the property owners for the other half, without going through all the formalities and experiencing the great delays of a regular street paving local improvement proceeding, by such method many streets would be saved before they were too far gone. In this way, it was assumed, both the property owner and the vehicle tax fund would

profit. The gain to the vehicle tax fund would come in through the doing away of repairs for a period of years.

In pursuance of the idea just mentioned, a bill was passed by the General Assembly four or six years ago for this purpose. This department found fault with this act, which was approved by the Governor and was supposed to be in force, on the ground that the arbitrary division of the expense rendered it unconstitutional. Thereupon we prepared, and there has been enacted, a new law which overcomes this objection and makes it possible to distribute the cost equitably between the vehicle tax fund and the property owner. (See act on "Disintegrated Pavements" appearing as Paragraph 235 of Chapter 24 of Cahill's Revised Statutes of 1923.)

We are most anxious to have a test made of the validity and practicability of this law, which was passed as we wanted it in 1923. We would suggest to you that the attempt be made on the particular street in which you are interested, but since this is in process we see no way in which it could be done without delaying the much-needed improvement. However, that does not interfere with appropriating from the vehicle tax fund for the public benefits assessed by the court in this case, if anything is to be gained thereby.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

**Refunds from Municipal Employees' Pension Fund to
Estates Where There Is No Widow or
Minor Child.**

September 23, 1925.

RETIREMENT BOARD, Municipal Employees Annuity & Benefit
Fund.

Gentlemen:

Replying to your request for an opinion covering the matter of refunds to estates where there is no widow or minor children, and where the status of the employee, in so far as annuity is concerned, has become fixed, the following is submitted:

As illustrative of an estate where there is no widow or minor children, and where the status of the employee, in so far as annuity is concerned, had become fixed, your letter cites the case of George Fromm, map draftsman, Bureau of Maps and Plats, who died on July 7, 1925, age 72, and whose annuity was fixed as of January 1, 1922.

I.

The right to a refund of contributions made to or salary deductions credited in the M. E. A. & B. Fund is given by Section 39 of the M. E. A. & B. Fund Act. Paragraph 2 of Section 39 reads as follows:

“Any such municipal employee shall retain such right to refund of such amounts when he shall apply for same, until the amount of annuity to which he shall have a right shall have been fixed as provided in * * * this Act. Thereafter, no such right shall exist in the case of any such * * * municipal employee.”

If no right existed in the employee, none can exist in his estate after his death.

II.

Paragraph E of Subdivision 5 of Section 39 provides as follows:

“In any case in which an amount equal to the total amount accumulated and credited to the account of a deceased municipal employee from sums deducted * * * from the salary of such municipal employee for annuity purposes in accordance with the provisions of this Act, and the sums deducted from the salary of such municipal employee or otherwise paid by him according to law and applied to any municipal pension fund * * * described in Section 52 or Section 52 1/2 of this Act, shall not have been paid to such municipal employee, and in the case of a married male municipal employee to such municipal employee and the widow of such municipal employee both together, in form of annuity before the death of the last of such persons who shall die, an amount equal to the difference between the sum of such amounts, and the entire amount paid in form of annuity or annuities, without interest upon either such amount, shall be refunded and paid to the children of such municipal employee, in equal parts to each, unless such municipal employee shall direct in writing, sworn to before an officer authorized to administer oaths in this state, and filed with the retirement board before the death of such municipal employee, that any such amount shall be refunded and paid to any one or more of such children; and if there be no such children such amount shall be refunded and paid to the heirs of such municipal employee according to the law pertaining to estates of deceased persons; provided, if any child or children of such municipal employee shall be less than eighteen (18) years of age such part or all of any such amount as shall be equal to the sum necessary to pay annuities in accordance with the provisions of this Act to such child or children shall not be refunded as hereinbefore stated to any child, or children, or heirs at law of such municipal employee but shall be transferred to the child's annuity fund (hereinafter described) of the annuity and benefit fund herein provided for and used therein for the purpose of paying annuities to children.”

It will be noted that the amount hereinabove referred to as being payable to the heirs of a municipal employee is limited to "the total amount accumulated and *credited*" to the account of the deceased municipal employee.

III.

Section 56 of the act provides that all moneys and property which shall be received by the retirement board for the annuity and benefit fund shall be placed in certain described funds. Paragraph D of said section provides that all moneys deducted from the salaries of municipal employes for age and service annuity and widow's annuity purposes shall be placed in the Salary Deduction Fund and an individual account shall be kept in this fund concerning each municipal employee, and that as such deductions or contributions are received *they shall be credited* to the account of the various persons for whom they should be made; also, that when the amount of annuity to be paid to any municipal employee or his widow shall be fixed or granted, the total amount in the Salary Deduction Fund for the purpose of providing such annuity and received for such purpose shall be taken therefrom and placed in the Annuity Payment Fund.

Paragraph E of Section 56 provides for the creation of a fund to be known as Annuity Payment Fund, and provides, among other things, that *all amounts of money which shall be deducted from the salary of any municipal employee after the amount of age and service annuity for such employee shall have been fixed shall be placed in the Annuity Payment Fund.*

It will be noted that after the amount of age and service annuity of a municipal employee has been fixed, no future salary deductions are *credited* to him, but that such salary deductions are paid directly into the Annuity Payment Fund.

The evident intent of the legislature was to provide for the building up and strengthening of the Annuity Payment Fund by requiring that, if a municipal employee continued in

his position after his age and service annuity had been fixed, then all salary deductions made from his salary should go into the Annuity Payment Fund and should not be credited to him nor be refundable to him.

I V .

Paragraph G of Section 17, Paragraph A of Section 27 and Paragraph B of Section 27, in addition to the sections and paragraphs hereinabove referred to, all bear out the principle underlying salary deductions, and clearly indicate that no salary deductions made after age and service annuity has been fixed can at any time or in any manner inure to the credit of the employee from whose salary such deductions were made, either for the purpose of increasing his annuity or as an accumulation thereafter to be refunded to him or to his heirs.

V .

I am of the opinion that neither in the case of George Fromm, nor in any case of the same character, would your Honorable Body be justified under the law in refunding to anyone any salary deductions made subsequent to the date on which age and service annuity of the employee in question shall have been fixed.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of Assistant Chief Clerks to Take Examination for Chief Clerk.

September 23, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication of the 16th instant states that a civil service examination has been called for the position of chief clerk, and that those civil service employees who hold the position of assistant chief clerks are denied permission to take this examination on the theory that the position of assistant chief clerk and that of chief clerk are in the same grade. You request an opinion as to the eligibility of such assistant chief clerks to take this examination.

The test of eligibility to try for promotion in the civil service is plainly prescribed by Section 9 of the Civil Service Act as follows:

“All examinations for promotion *shall* be competitive *among such members of the next lower rank* as desire to submit themselves to such examination.”

The right here given to every member of the next lower rank, engaged in the same line of service, is given in language so plain and unequivocal as to admit of no possible construction by any court or commission that would in any degree limit or circumscribe that right. It is not within the power of the Civil Service Commission itself by rule or administrative act nor in the appointive power by delegation of authority from the Commission, to deprive the civil service employee of this right. Any such rule or act of the Commission, or delegation of authority would be illegal and void under the Civil Service Act.

People ex rel. Kaster v. Kearney, Com., 164 N. Y. 14, 58 N. E. 64.

See Opinion No. 680, Com. of Pub. Wks., of date Dec. 9, 1924.

The stated theory of the Commission for holding the assistant chief clerks ineligible to promotion to the position of chief clerk, namely, that such positions are all in the same grade, is obviously illegal and inconsistent. It is illegal because Section 9, *supra*, specifically provides that right of promotion shall be to those in the next lower rank, not next lower grade. This is also the provision of Section 2, Rule V of the Commission.

It is inconsistent because the assistants to the chief clerk are higher in both rank and grade than those employees in the next lower grade who are accorded the right to take this examination, and such assistants to the chief clerk are obviously in the *next lower rank* to their chief clerk, in the same line of service, and are therefore entitled to the promotional examination for the higher position as against those in the next lower grade. Indeed the test of eligibility prescribed by the Civil Service Law limits eligibility to those only who are in the next lower rank in the same line of service to the position to be filled. This eligibility must be determined by the facts themselves and no rule or administration of the Commission in conflict with the operative facts can change the application of the specific rule of law, which binds the Commission as well as defines the right of the civil service employee.

The People v. Errant, 229 Ill. 56.

That there may be different ranks in the same grade of the civil service and thus render eligible to promotion only those in the same grade who are in the *next lower rank*, as against those in the next lower grade, is recognized by the Civil Service Commission itself in Section 5 of Rule 1, which is as follows:

“Sec. 5. GRADE AND RANK CONTRASTED.) Grade is more inclusive than rank within the meaning of these rules. In situations where the ascertained status of positions herein classified into grades accorded to one group

or individual a definite or acknowledged standing over another, the recognition of rank shall take precedence over grade. * * * Rank shall be held to include only those offices and places of employment performing the same particular kind and character of work and of equal authority and precedence."

In construing a substantially similar rule of the Commission, the Supreme Court said:

"Under this rule, classification for promotion must be from rank to rank, except as otherwise provided, *in the same line of service*. The requirement that the promotion is to be in the same line of employment rests on the rational basis that careful and studious attention to the duties of one station or place has an educational tendency to prepare one for advancement to a higher position in the same line. In our opinion the proper construction of these rules is that promotion shall be made upward,—that is toward the higher salaried place from the grade (rank) next below in the same line of employment,—and that the same line of employment means those positions in the various departments the duties of which are so related to the duties of the higher place that a thorough knowledge of them is in a degree preparatory for the duties of the higher position."

The People v. Errant, 229 Ill. 56, pp. 64, 65.

The foregoing language of the Supreme Court aptly describes the relationship of the position of assistant chief clerks to that of the higher position of chief clerk, and clearly establishes the right of such assistant chief clerks to take the promotional examination to fill the position of chief clerk.

To permit employees in the next lower *grade* of the civil service to take a promotional examination who are necessarily two ranks lower in classification than the position of chief clerk, in company with or to the exclusion of the assistant chief clerks who are in the next lower rank to the position of chief clerk, is clearly illegal and invalid. To this effect was the recent decision of the Superior Court of Cook County (Judge Mangan, presiding) in the case of lieutenants in command of fire companies who demanded the right to participate with captains in the promotional examination for

chief of battalion in the Fire Department. (*See People ex rel. Clark v. Finn et al.*, No. 417821.)

Very truly yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Installation of Municipal Lighting in Private Street.

September 24, 1925.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

We have your letter of the 12th inst., in which you make inquiry as to the City's right and authority to install and maintain a lighting system in and upon private streets, particularly Beverly Glenn parkway, between 99th and 100th streets.

Under Section 1626 of The Chicago Municipal Code of 1922, among other enumerated powers, your department is charged with the management of *municipal lighting*. This section contains no reference to the places of installation or manner in which said municipal lighting shall be made operative. It is our opinion that if in your judgment a better lighting system could be made possible in certain localities within our corporate limits by the placing of electric light poles upon private property, with the consent of the owner of said property, it could be done.

Funds for street lighting purposes have lately been obtained through the issuance of bonds. The language of the ordinance passed by the City Council submitting the proposition of a bond issue to the electorate reads "for the extension and rehabilitation of the street lighting system of the

City of Chicago." No reference here is made of the place or manner of installation.

These bonds are retired by the application of a portion of the taxes levied against owners of all property situated in the City of Chicago. It would be highly inequitable for the property owners in and along Beverly Glenn parkway to be assessed for the payment of their pro rata share of street lighting bond funds and then be obliged to install and maintain an independent lighting system. Particularly so, when there are no restrictions in the bond issue ordinances or the general ordinances prohibiting the installation of lighting facilities anywhere within the municipality where such installation would resolve into benefits for the whole of the municipality.

There being every indication of an unrestricted use of Beverly Glenn parkway as a public street for all intents and purposes, we see no legal reason why your department cannot extend its lighting facilities to include the same, conditioned, of course, upon being granted express approval by the City Council.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Civil Service Commission as to Suspensions.

September 25, 1925.

MR. WILLIAM FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

On June 18, 1925, you requested an opinion of this department as to whether or not the Civil Service Commission,

after a hearing on charges preferred in accordance with Section 12 of the Civil Service Act, has the power to order the suspension of an employee where the evidence is insufficient to warrant a discharge.

This question is covered solely by the provisions of Section 12 of the Civil Service Law. That Section provides:

“Sec. 12. REMOVALS.) No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause, upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by or before said civil service commission, or by or before some officer or board appointed by said commission, to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days. In the course of an investigation of charges each member of the commission, and of any board so appointed by it, and any officer so appointed shall have the power to administer oaths and shall have power to secure by its subpoena both the attendance and testimony of witnesses, and the production of books and papers relevant to such investigation. Nothing in this section shall be construed to require such charges or investigation in cases of laborers or persons having the custody of public money, for the safe keeping of which another person has given bonds.”

It is perfectly obvious from this language that the intent of the legislature was that the Civil Service Commission should hear and determine charges against employes where the charges assign a cause sufficient for removal from the service. In other words, the function of the Commission is to determine whether the cause assigned is sufficient to justify a removal from the service and whether sufficient evidence is introduced to substantiate such charges and authorize such removal.

The clause regarding suspensions reads:

“Nothing in this Act shall limit the power of *any officer* to suspend his subordinates for a reasonable period, not to exceed thirty days.”

The words “any officer” obviously refer to the immediately preceding clause in which the words “appointing officer” are used. The *Kipley* case, 171 Ill. 44, makes it very clear that the appointing officer is not the Commission, but the head of the department who has made requisition upon the Commission for an eligible to fill an office or position in the classified service.

I am therefore of the opinion that the Civil Service Commission has no power after a hearing on charges preferred in accordance with the provisions of Section 12 to order the suspension of an employee where the evidence is insufficient to warrant discharge. There is no reason, however, why the head of the department could not suspend such employee for a reasonable period, not to exceed thirty days, after a finding by the Commission that the evidence was insufficient to warrant discharge but justified some disciplinary measure.

If the Commission should decide in a given case to recommend to the head of a department that an employee should be suspended for such reasonable period, the finding of the Commission on the charges would have to be drafted with considerable care, and we would suggest that the first of such findings be taken up with this department so that a proper precedent might be established.

Very truly yours,

FRANCIS J. VURPILLAT,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Dry Cleaning Establishment—Necessity for Qualifying After Temporary Suspension.

September 25, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Commissioner :

We have your communication of the 18th inst., which presents to us a hypothetical question as to whether or not a dry cleaning establishment, having been in operation for 20 years and having temporarily halted its activities for a period of weeks, can resume such business without qualifying under the strict provisions of the present ordinances.

You further state in setting forth the facts that most of the apparatus and equipment in the plant had been removed and new equipment subsequently installed. At no time, do we gather from your letter, has there been a complete abandonment of the premises, nor do we understand that permanent cessation of the dry cleaning business at said location was ever contemplated. Further, you inform us that a license to do a dry cleaning business on said premises for the year 1925 is still in force and effect.

We are of the opinion, in view of the circumstances cited, that there does not appear to be a sufficient abandonment of the premises nor any intention of relinquishment on the part of the operators of said dry cleaning establishment as such to warrant this office in declaring that the requirements of the present ordinances are necessary to be met with before this place can continue to be operated as a dry cleaning establishment.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Ventilation in Club Dining Room.

September 25, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of September 18th, enclosing a communication from Arthur W. Nelson, Esq., a consulting engineer with offices at 123 West Madison street.

From the communications of Mr. Nelson and yourself, and after conferences with Mr. Nelson and your department, the situation that is presented to this department is about as follows:

In the High Noon Club of Chicago, to be located in the Gage building, a certain room (or rooms) falls within the provisions of Section 470, Paragraph E, in relation to the ventilation thereof.

The said Section 470, Paragraph E of The Chicago Municipal Code of 1922 reads as follows:

“(e) In every building hereafter erected for or converted to the purposes of this class, every room not otherwise specifically provided for in this section shall, where practicable, have a window or windows, with a total glass area of not less than one-tenth of the floor area of such room, opening directly onto a street, alley, yard or court, and no such window shall have a width of less than one foot or a total glass area of less than ten square feet, unless such windows is in excess of the ten per cent of floor area requirement; *provided that if it be impracticable to ventilate any such room by windows as aforesaid, such rooms shall be ventilated by an approved mechanical ventilating system which shall effect at least six complete changes of air per hour, the air supply being*

taken from the outer air at a point not less than ten feet above the street level."

It not being possible to comply with the window requirements of the said ordinance as to such room, mechanical ventilation must be resorted to.

It has been the practice of your department, you state, to rule that the above paragraph requires that air be taken from outside and forced into the room by means of a fan or other mechanical device.

Mr. Nelson contends that any mechanical ventilating system which would produce the result required would be a compliance with the above section inasmuch as the ordinance itself does not specify in detail the method to be followed to accomplish its purpose.

Paragraph E of Section 470 provides that such room shall be ventilated by an "approved mechanical ventilating system." We do not believe that this necessarily means that the ventilating system must be one the details of which are specified by the Department of Health. If that were the intent of the ordinance, we think the ordinance would specifically so state, but all the ordinance says is that it must be an "approved mechanical ventilating system."

Under Section 470 any mechanical ventilating system, we think, may be used which would have the approval generally of competent ventilating engineers as being adequate and efficient to accomplish the purpose of the ordinance,—that is, to effect at least six complete changes of air per hour.

How, where, or in what manner the fans or other devices should be placed or operated is purely an engineering problem, and if the system installed does the work properly, regardless of the details of installation, that is all the ordinances seem to require.

Now Mr. Nelson has presented to your department certain plans for the mechanical ventilation of the room, and he contends that the system which he has planned will when installed produce the result required by the ordinance, that

is, "effect at least six complete changes of air per hour, the air supply being taken from outer air at a point not less than ten feet above the street level."

His plans, it is conceded, are not in absolute accordance with the manner in which your department believes the system should be installed.

Are you required then, as a matter of law, to approve his plans for the mechanical ventilation of the said room, he being a consulting engineer, and he representing to you that his mechanical ventilating system upon being tested after its installation will accomplish the results provided for in the ordinance?

In other words, must you approve his plans in advance and await the result of the test the ordinances require you to make to ascertain whether the mechanical ventilation system installed will produce the effect which the ordinance demands?

Because of the far-reaching importance of this question upon the approval of plans of different kinds that are presented to the various departments, we have given this matter very careful consideration.

The ordinance does not specify the details of the system to be installed. If, however, the engineers of your department as a result of their training and experience in such matters have reason to believe that a proposed mechanical ventilating system will not accomplish the results which the ordinance requires, we think you would be justified in declining to approve any such plans that may be submitted for such a mechanical ventilating system.

On the other hand, if the engineers of your department feel that a proposed mechanical ventilating system will accomplish the results required by the ordinance, even if it does not agree with their own ideas as to what should be the details of such a mechanical system, we think in that event the plans should be approved as submitted as the ordinance does not specify the details of the system to be installed.

What we have stated above in reference to Paragraph E of Section 470 is, in our judgment, equally applicable to Paragraph A of Section 2153.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Time from Which Ordinary Disability Benefits Shall Be Allowed.

September 26, 1925.

THE RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

Your Honorable Body has requested an opinion from this department as to the time from which and for which ordinary disability benefits must be allowed.

Section 46 of the Policemen's Annuity and Benefit Fund Act, as amended July 1, 1925, contains the following provisions:

"Any policeman less than fifty-seven (57) years of age, who shall become disabled subsequent to the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, as the result of any cause other than injury incurred in the performance of an act or acts of duty, shall have a right to receive ordinary disability benefit during any period or periods of any such disability, for which such policeman shall not receive nor have a right to receive any part of his salary, which shall not exceed, in the aggregate, throughout the entire period of

such policeman's service, a period of time equal to one-fourth ($1/4$) of the entire period of service rendered by such policeman in the service of such city prior to the time he shall have become so disabled, and which shall not exceed five (5) years in any case * * *

"The first payment of ordinary disability benefit which any policeman shall have a right to receive shall be made not later than one month after such benefit shall be granted by the retirement board, and each subsequent payment of such benefit shall be made at a time not later than one month from and after the time when the latest payment of such benefit shall have been made."

* * * * *

"Ordinary disability benefit shall consist of an amount equal to fifty (50) per cent of the salary of such disabled policeman, as such salary shall be at the time such disability shall occur, for a period of time equal to any period of time for which any payment of such disability benefit shall become due and payable * * *"

* * * * *

"The retirement board shall estimate the sum necessary to provide ordinary disability benefits during each calendar year. Such estimates shall show the amounts to be contributed during such calendar year by the policemen included under the provisions of this section and by the city."

* * * * *

"Beginning on the first day in the month of January of the second year after the year in which this Act shall come in force and effect in such city, and during each year thereafter one-half ($1/2$) of the total sum which shall be estimated annually by the retirement board as necessary to provide ordinary disability benefits during such year shall be contributed by the policemen included under the provisions of this section as follows:

Such amount (one-half [$1/2$] of said total sum) shall be prorated among all such policemen in proportion to the annual salary of each such policeman, the percentage of each such annual salary which the sum related thereto shall constitute shall be ascertained, and a sum equal to a like percentage of each payment of such salary shall be deducted from each such payment of such salary."

Section 47 of the amended act provides as follows:

“Notwithstanding the provisions of sections 45 and 46 of this Act, if any policeman who shall apply for or who shall have been granted any disability benefit under the provisions of said sections 45 or 46 shall refuse to submit to examination by any physician or surgeon appointed as aforesaid, such policeman shall not have any right to receive such disability benefit and any such benefit which shall have been granted shall be cancelled immediately upon such refusal.

Notwithstanding the provisions of section 46 of this Act, any policeman who shall have been retired upon pension on account of disability under and by virtue of any law pertaining to police pensions in effect in such city prior to the first day in the month of January of the first year after the year in which this Act shall have come in force and effect therein, and who shall have been reinstated in the police service of such city on or after said day, and who shall not have served at least one (1) year subsequent to the date of such reinstatement shall not have any right to receive any amount as ordinary disability benefit in excess of an amount equal to the sum he shall have previously received as pension on account of disability, for or during an equal period of disability. The provision shall apply throughout the duration of any disability incurred by any such policeman within one (1) year after his reinstatement in the service which shall result from any cause other than injury incurred, after such reinstatement, in the performance of an act or acts of duty.

No disability benefit shall be paid on account of any form of disability for any period of time for which a disabled policeman shall receive any part of his salary, and no such benefit shall be paid for any period of disability for which a disabled policeman shall have any right to receive any part of his salary under any law or ordinance in effect in such city.”

There does not appear to be any uncertainty in the act as to the time from which ordinary disability benefit should be computed, nor as to the period for which such benefits must be allowed, since the act specifically provides that any policeman:

“Shall have a right to receive ordinary disability benefit during any period or periods of any such disability for which such policeman shall not receive nor have a right to receive any part of his salary.”

This “period” of disability benefit necessarily covers the *entire* time of disability for which said policeman received no salary nor had any right to receive salary.

I am of the opinion that, under the law as it now reads, a policeman entitled to ordinary disability benefit has a right to demand and receive such benefit during such period of disability from and *immediately following* a suspension of his salary payments, and for any period of disability during which he did not receive nor have a right to receive any part of his salary.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Rehearing on Zoning Ordinance Appeal.

September 28, 1925.

TO THE HONORABLE, THE BOARD OF APPEALS.

Gentlemen:

You have submitted to this department for approval as to form Resolution No. 518-25-Z, which was adopted by your board on September 22, 1925. This resolution shows on its face that it is a “Rehearing.” It embodies an appeal from the decision of the Commissioner of Buildings in refusing to issue a permit for the erection of an apartment building, the proposed building being in violation of the provisions of the Zoning Ordinance.

The public record in the case discloses that this appeal (Resolution No. 518-25-Z) was formally denied by the unanimous vote of your board on September 8, 1925, on which date a resolution was adopted by your board which contains among other things the following findings:

“WHEREAS, the Board of Appeals, having fully heard the testimony and arguments of the parties and being fully advised in the premises, finds that in this case there are no practical difficulties or unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance,

“RESOLVED, that the decision of the Commissioner of Buildings be and it hereby is affirmed and that *the appeal be and it hereby is denied.*”

You now present to us for approval as to the form thereof a new resolution of the same serial number in the same case, in which your board reverses its action and makes absolutely contrary findings in the following language:

“WHEREAS, the Board of Appeals, having fully heard the testimony and arguments of the parties and being fully advised in the premises, finds that in this case there is unnecessary hardship in the way of carrying out the strict letter of the zoning ordinance, and that the spirit of the zoning ordinance may be observed, public safety and welfare secured and substantial justice done by permitting the construction of the proposed structure conditionally, it is therefore

“RESOLVED, that the Board of Appeals hereby make a variation in the application of the volume district regulations of the zoning ordinance and that *this appeal be and it hereby is granted,*” etc., etc.

In other words your board has formally adopted two resolutions in this case, one dated September 8th, denying the appeal, and another dated two weeks later, granting the appeal, both based upon the identical grounds of appeal filed with the board.

September 8th your board formally resolved that there is *not* unnecessary hardship in this case, and September 22d your board formally resolves that there is unnecessary hard-

ship, though as appears from the record the situation was no different on September 22d, so far as "unnecessary hardship" is concerned, than it was on September 8th.

The question presents itself, then, whether, as a matter of law, the Board of Appeals has the right to rehear this appeal after it has once formally denied the same.

We are constrained to advise you as a matter of law that, in our opinion, your board has absolutely no power or authority to hold rehearings or to sit in review of its own formal decisions.

The proceedings of your board are purely statutory, and nowhere does the statute make provision for rehearings by your board or a review by your board of *its own* decisions.

The statute provides the method to be followed in reviewing your decisions, but it is plain and explicit that such review shall be by the courts upon certiorari proceedings, and not by the Board of Appeals by action taken in the guise of a rehearing.

The proceedings of your board must follow strictly the terms of the statute, and where they are not in strict accord with the provisions of the statute, in our opinion, they are void, and of no force or effect whatsoever.

Under the present state of the record in this case, two entirely different sets of certiorari proceedings might arise, one filed by a person aggrieved because of your denying the appeal, and another filed by a person aggrieved because of your granting the appeal, because you have done both, as set forth by the two resolutions adopted. Both resolutions being public records, and made so by the statute, both may be reviewed by the courts on proper certiorari proceedings being filed.

It becomes the duty of this department to endeavor to sustain in the courts the decisions of the Board of Appeals in cases where they are attacked, but we feel it would be futile to endeavor to sustain in the courts the resolution you now submit for our approval, because of want of authority in your

board to adopt the same as the result of a so-called "rehearing."

The Illinois Zoning Statute, as you are doubtless aware, is the same as the New York Zoning Statute as regards the powers granted to boards of appeals. The New York courts have held in no uncertain terms that the New York Board of Appeals has no power to rehear cases.

It is a familiar rule of construction that in adopting the language of the statute of another state, it is presumed that the General Assembly intended that it should receive the construction given it by the courts of the state from which it was adopted unless such construction is in conflict with the spirit and policy of our laws (187 Ill. 67).

In the case of *People v. Leo*, 198 N. Y. Supp. 399, the New York Supreme Court passed on the exact question now before us, and in that decision the court said:

"The question of the right of the board of appeals to rehear an application after it has once been denied is squarely presented upon this application. This board is a quasi judicial body. *People ex rel. Cotton v. Leo*, 194 App. Div. 921, 184 N. Y. Supp. 943. The general rule, therefore, is that such a board is not vested with the power to reopen and rehear a proceeding which has once been terminated. *People ex rel. Smith v. Clarke*, 174 N. Y. 259, 66 N. E. 819; *Osterhoudt v. Rigney*, 98 N. Y. 222; *People ex rel. Chase v. Wemple*, 144 N. Y. 478, at page 482, 39 N. E. 397.

"The Zoning resolution having been passed by the sanction of the Legislature, has the force of a statute; but nothing therein contained gives the board power to reopen and review its acts, after it has once determined and terminated the proceeding. Its jurisdiction is therefore limited to hearing and determining appeals. * * *

"The board of appeals can in no sense act other than in a quasi judicial capacity. It does not perform a single administrative or legislative act. As its name implies, it is an appellate tribunal. It passes upon matters formally brought to its attention, much the same as courts. It hears evidence and argument, and decides controversies as the evidence dictates. It cannot act without some evidence. The record here shows that it denied this ap-

plication for good reason and upon sufficient evidence to sustain its conclusion. There was not a scintilla of evidence presented to the board to warrant it in changing its final disposition of this proceeding. Presumably it had thoroughly considered the matters before it. A committee of its members had viewed the premises, and they had heard the parties in favor of and in opposition to the application. They acted judicially, and adopted one of the only two courses open to it, namely, to grant or deny the application.

"The judgment of the majority of the board dictated a denial of the application, and its action in so doing should not be again reviewed because of a whim on the part of some of the members of the board. Were such a course generally followed, there would be no finality to a proceeding.

"A change of opinion on the part of a majority of the board, whether based upon sentiment, or on good or on improper reasons, would suffice to warrant the opening of any proceeding finally determined by the board, if such power was vested in it. * * *

"Aside from the authorities controlling in matters of this kind, preventing the reopening of a determination of a quasi judicial board, the rule which leads to that conclusion is a salutary one. If such board were vested with the power of review, the members would always be subject to such charges as are made here, namely, of improper influences which are not disclosed by the record."

The Appellate Division of the New York Supreme Court, in a decision rendered May 22, 1925, in the matter of *McGarry v. Walsh*, reached exactly the same conclusion in another case where the New York Board of Appeals reopened proceedings upon an appeal and reversed its previous decision just as your board has done in the instant case. In the latter case the court held that the board of appeals was a quasi judicial body and had no power to reopen its decisions or grant rehearings.

The rule adopted by the New York courts in holding that the New York Board of Appeals cannot hold rehearings, we have no doubt, would be followed by the courts of Illinois

under the familiar rule of construction we have referred to above.

However, aside from that the Illinois Supreme Court also has already held in an almost identical case that a quasi judicial board cannot hold rehearings. (*Centralia Coal Company v. Illinois Industrial Commission*, 297 Ill. 454.) That case in all its aspects was very similar to the zoning case under discussion.

The Illinois Industrial Commission under the statute had held a hearing and formally refused compensation in a certain case. That decision of the Industrial Commission had not been reviewed in accordance with the provisions of the compensation statute by certiorari proceedings. But thereafter the Industrial Commission upon rehearing reviewed the case and made a new decision awarding compensation.

Like the proceedings and findings of the Board of Appeals, the proceedings and findings of the Illinois Industrial Commission are altogether statutory and partake of the nature of judicial proceedings (317 Illinois 482). The Compensation Act like the Zoning Act provides for review of decisions by statutory certiorari proceedings in the courts (297 Illinois).

In its decision in this case our Supreme Court said:

“This decision on review shows on its face that the (Industrial) Commission actually reviewed its former decision and set it aside and substituted the decision now in question in its stead. The decision of the Commission entered April 23, 1919 (the original decision) was *res judicata* of the questions there presented and it (the Illinois Industrial Commission) had no authority, under the statute, on a subsequent hearing to review and set aside that decision. The proceedings before the Industrial Commission are wholly statutory and its authority is limited to that granted it by the Workmen’s Compensation Act. The judgment must therefore be reversed and the decision of the Industrial Commission set aside.”

We believe that the decision of your board in Case No. 518-25-Z entered September 8, 1925, was *res judicata* of the

questions there presented, and that the resolution adopted by your board September 22, 1925, upon a rehearing in the same case, is void and would be set aside by the courts upon certiorari proceedings, for the reason given by the Supreme Court in setting aside the decision of the Illinois Industrial Commission. There is no difference in the legal principle involved in the two cases.

We feel that we have no alternative but to return to you without our approval Resolution 518-25-Z, for the reasons herein outlined.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

Basis for Computing Age Under Policemen's Pension Act.

September 28, 1925.

THE RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen :

Replying to your request for an opinion as to the proper method of computing the age of applicants for annuity, that is, whether the age should be computed from the latest birthday of the applicant or from the nearest birthday of the applicant, the following is submitted :

The Policemen's Annuity & Benefit Fund Act does not define the word "Age" and contains no provision as to the method of computing age.

In law, legal age is not attained until the last day of the final year has been reached. At common law a male minor is not competent to contract until the day preceeding his 21st birthday anniversary, that day being the last day of his 21st year of existence.

The statutory enactment creating the Park Employees Annuity & Benefit Fund, as amended June 28, 1921, contains the following provision in Section 4 thereof:

“ ‘Age’ shall mean age at latest birthday.”

I am informed by Mr. Hirsh, the actuary of your office, that the basic tables on which annuities are computed are figured on full years and not part years or averages.

I am of the opinion that your Honorable Body should adopt a resolution defining “Age” for the guidance of your office and I am enclosing herewith a form of resolution defining “Age” in the same manner as the word is defined in the Park Employees Annuity & Benefit Fund Act, hereinabove quoted.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Pension Rights as Affected by Military or Naval Service.

September 28, 1925.

THE RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

Replying to your request of September 22, 1925, for an opinion as to the service credit rights of James L. McCann, the following is submitted:

Your letter states that Mr. Hirsh called your attention to the fact that the records show that James L. McCann was absent on account of service in the war; that you wrote to Mr. McCann stating that if he would bring in his discharge papers credit would be given him for time while in military service; that Mr. McCann brought in a statement showing that he had been secretary of an organization doing welfare work with the American Expeditionary Forces in France for about five months; that he was under military orders and discipline and was assigned to the Sixth Division during the last drive in the Argonne and was in the field of danger all the time; that Mr. McCann desires service credit for the said period of absence.

Section 49 of the Policemen's Annuity & Benefit Fund Act, as amended July 1, 1925, provides that in computing the term of service rendered by any policeman prior to January 1, 1922, certain periods of time shall be counted in addition to periods of time during which such policeman performed the duties of his position, as periods of service for annuity purposes only, and which certain periods are:

- (1) All periods of vacation;
- (2) All periods of leave of absence with whole or part pay;
- (3) All periods of leave of absence without pay which were necessary on account of disability;
- (4) All periods of leave of absence during which such policeman was engaged in the military or naval service of the United States of America.

If the period of absence referred to in the case of Mr. McCann was a period of vacation, or a period of leave of absence with whole or part pay, or a period of leave of absence without pay which was necessary on account of disability, which such period he took advantage of to serve as a secretary in an organization doing war welfare work during the World War, he would be entitled to be credited with such period for annuity purposes only; not because he was so engaged as a secretary, but because his absence would fall under one of the classifications of allowable time.

I am of the opinion, however, that technically speaking, service by a policeman during the World War, either at home or overseas, in the capacity of secretary or other officer or employee of a welfare organization, or of an organization doing war relief work or war welfare work, would not of itself entitle him to be credited with such period of service as having been "engaged in the military or naval service of the United States of America" unless he had been actually inducted into such military or naval service, or unless your Honorable Body should by resolution construe the words "military or naval service" to be sufficiently broad as to include all persons actually engaged in war work on the battle fronts or in military or naval camps on bases of the United States.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Resolution Concerning Annuities of the Municipal Employees Annuity & Benefit Fund.

October 2, 1925.

RETIREMENT BOARD, Municipal Employees Annuity & Benefit
Fund.

Gentlemen:

Replying to your letter concerning the resolution relating to annuities, as passed by the board, the following is submitted:

Your letter states that the form of resolution heretofore used reads as follows:

“RESOLVED: That each of the following named be granted an annuity of the amounts set opposite their names, the same to begin upon their separation from the services of the City of Chicago, with the provision that if the separation does not take place on the dates stated, the actuary shall recompute the annuity, and if his findings differ from those herein stated, he will recompute the same and report at a subsequent meeting of the Board.”

The above resolution is accompanied by the names and other data of the persons granted annuity; and the treasurer of the board contends that the amounts shown are incorrect as they represent monthly amounts, whereas, annuities are an annual amount.

It is respectfully suggested that the above resolution be changed by inserting the words “per month” after the word “amounts” and before the word “set,” so that the resolution will read: “Resolved: That each of the following named be granted an annuity of the amounts per month set opposite their names, the same to begin,” etc., as above.

It is also respectfully suggested that your Honorable Body pass a resolution to the effect that wherever the above first quoted resolution has heretofore been used in the proceedings of your Honorable Body the words “an annuity of the amounts set opposite their names,” contained in said resolution, shall be construed to mean “an annuity of the amounts per month set opposite their names.”

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Voting Rights of Beneficiaries.

October 2, 1925.

RETIREMENT BOARD, Municipal Employees Annuity & Benefit Fund.

Gentlemen :

Mr. William D. Cassidy, clerk of the board, has requested an opinion as to the voting rights of beneficiaries of the fund who are simply contributors to the ordinary disability feature of the fund, in connection with the approaching election of a trustee of the fund.

Section 2 of the M. E. A. & B. Fund Act provides for the annual election in the month of December of a member of the Retirement Board from among the municipal employees of the City of Chicago. Among the provisions of Section 2 of the act is the following :

“At all such elections all municipal employees (as hereinafter defined) employed by such city or the Board of Education of such city at the time any such election shall be held shall have a right to vote and the ballot shall be of secret character.”

Section 12 of the same act defines the term “Municipal Employees,” and the fact that the employees in question are beneficiaries of the M. E. A. & B. Fund presupposes their status to be that of “Municipal Employees” within the definition set out in Section 12.

I am of the opinion that municipal employees who are contributing to the ordinary disability fund of the M. E. A. & B. Fund are entitled to vote for a “Municipal Employee” member of the Retirement Board.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved :

LEON HORNSTEIN,

Acting Corporation Counsel.

Refunds Payable to the Estate of Deceased Beneficiaries.

October 3, 1925.

RETIREMENT BOARD, Municipal Employees Annuity & Benefit Fund.

Gentlemen :

Replying to your letter relative to refunds payable to the estate of a deceased beneficiary, the following is submitted :

Section 39 of the M. E. A. & B. Fund Act provides for the payment of refunds under certain circumstances.

Paragraph "E" of said Section 39 provides, among other things, that where there is a refund to be paid which has not been paid to the municipal employee before his death and there are no children of such municipal employee, such amount should be refunded and paid to the heirs of such municipal employee according to the law pertaining to estates of deceased persons.

Your letter states that in most cases the amount of refund is about all there will be to the estate, and that it is desirable to arrange for the payment of this refund to one or more of the relatives as attorney or attorneys in fact for all of the heirs.

If all of the heirs at law and next of kin of the deceased employee are adults, such adults can jointly execute a written power of attorney authorizing and directing your Honorable Body to pay the amount of said refund to one or more of them as may be indicated in the instrument, and upon delivery of such instrument, properly executed, your Honorable Body would be authorized in making payment as directed.

Complying with your request for a form to be used in such cases, the same is hereto attached.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Proposed Contract with Telegraph Company to Lay
Cables in Tunnel of City Underneath River.**

October 7, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter of the 21st ult., transmitting a communication from the Western Union Telegraph Company in which that company states its desire to contract with the City for the right to lay telegraph cables in a portion of the tunnel in North Wells street under the Chicago river. The company's proposal and your general request for legal advice thereon present two legal questions—first, has the City such title and ownership in said tunnel under the Chicago river that it can grant to the company the privilege of laying its cables therein, and second (if the first question be answered in the affirmative), has the Commissioner of Public Works or any other administrative officer of the City authority to make such contract with said company, or is the proposed contract a grant of the right to use the public streets and other public property which must be specifically authorized by the City Council.

Said tunnel in North Wells street was constructed by the Chicago Postal Pneumatic Tube Company under authority of an ordinance passed July 13, 1903, accepted October

12, 1903, as amended by an ordinance passed June 1, 1909, accepted June 17, 1909. The former ordinance granted to the company right and authority to construct and operate in public streets and places a system of tubes and conduits for the transportation of mail by compressed air or other power, for the period of twenty years from and after acceptance of said ordinance. Said twenty-year period expired October 12, 1923. The amendatory ordinance of June 1, 1909, specifically provided that the rights and privileges therein granted should cease and determine on October 13, 1923. The authority conferred by each of said ordinances has therefore expired by lapse of time.

Section 9 of said amendatory ordinance contained the following provisions, in respect to title, ownership and possession of the tubes, tunnels, conduits and other property to be constructed by said company which should be located in the public streets and places of the City at the expiration of said ordinance grants:

“At the expiration of this grant all the tubes of this grantee then in the streets, alleys or other public grounds, together with said tunnel (and tubes or conduits located therein), constructed or maintained or operated under the Chicago river shall be and become the absolute property of the city of Chicago, and this grantee hereby and in consideration of these presents agrees to convey the said tubes and conduits (and tubes and conduits located therein) free of all liens or encumbrances by proper deed of conveyance to the city of Chicago or to any person, firm or corporation that may be selected by said city of Chicago.”

Section 9 of the ordinance of July 13, 1903, contains the same provisions except for the specific reference to said tunnel under the Chicago river, construction of which was authorized by the amendatory ordinance. We have quoted the language of the amendatory ordinance, since the use of space in said tunnel is the subject of the contract proposed by the telegraph company.

While no deed of conveyance or other written instrument of title to the tubes, conduits and other property lo-

cated in the public streets or in the tunnel under the Chicago river on October 13, 1923, has ever been executed and delivered to the City by the Chicago Postal Pneumatic Tube Company, we are of the opinion that such deed of conveyance or other instrument was not needed in order to vest in the City the title to said tubes and other properties, but such property, as against said company, would revert to the City by force of the ordinance provisions themselves upon the expiration of the authority granted in said ordinances and cessation of the company's right to maintain and operate its business in the streets. The City therefore has sufficient title to said tunnel that it may, if the City Council so desires, grant the right to use the same or any portion thereof to any person, firm or corporation legally capable of receiving grants of the right to use public streets and places.

In respect to the second question stated above, we are of the opinion that such a contract must be authorized directly by the City Council. Sections 1679-1680 of The Chicago Municipal Code of 1922, as amended, confers upon the Commissioner of Gas and Electricity power to lease space not used for municipal purposes in the *City conduit system*. Sections 3282-3283 of said code authorizes the Commissioner of Public Works to grant permits for the use of space in water tunnels by public utility companies. Neither of these sections, however, would apply to a system of tubes and conduits constructed by a public utility company and reverting to the City under the terms and provisions of franchise ordinances. No general authority to lease or otherwise grant the use of tunnels, tubes or conduits in the public streets is granted by the code to any administrative officer of the City, and such a contract must therefore be specifically authorized or ratified by the City Council.

Very truly yours,

C. MORTON DOTY,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

Status of School Board Employee Taking Up His Residence Outside of City Limits.

October 7, 1925.

WILLIAM FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

We have your communication of August 3d in which you state that the Board of Education has requested that your commission enter a ruling upon the question "whether or not there is anything in the Civil Service Act which would prevent a civil service employee from taking up his residence outside of the City limits" in order that said board in permitting it employees to reside outside of Chicago in conformity with an opinion heretofore rendered by this office may not be deemed as having contravened Section 2825 of The Chicago Municipal Code of 1922, reading:

"2825. CITY EMPLOYEES TO BE RESIDENTS OF THE CITY.) All officers and employes in the classified civil service of the city shall be actual residents of the city of Chicago. Any officer or employe in the classified civil service of the city who shall fail to comply with the provisions of this section shall be discharged from the service of the city in the manner provided by law."

This section is made a part of Article II of Chapter LIV entitled "Officers and Employes." Its statutory foundation is doubtless based upon the Seventy-first clause of Paragraph 65 specifying the powers of city councils, in the Cities and Villages Act, reading:

"To provide by ordinance in regard to the relation between all the officers and employes of the corporation in respect to each other, the corporation and the people."

By "An Act to regulate the civil service of cities" the Civil Service Commission is charged with certain specific du-

ties to be performed, such as the preparation and holding of original entrance and promotional examinations as well as the power to constitute itself as a tribunal whenever cause exists for the hearing of charges for the removal of civil service employees.

It is our view that from the moment of an applicant's certification into the classified civil service of the municipality, he becomes subservient to the ordinances of the City, among which Section 2825 above is a part.

The City Council may through means of an appropriation ordinance retire City employes from service; it may increase their salaries, change their hours, shorten or lengthen their vacation periods, and otherwise regulate their conduct. Would it then be considered an unreasonable requirement for the council to require its employees to live within the boundaries of the City?

If as a condition precedent to their examination for civil service positions, it is required of candidates by the statutes on civil service that they be residents of the City and the statute is silent as to such requirement after certification, such silence cannot be construed as a release from such obligation, because from the moment of certification the civil service division has no further hold or control of employes except to determine their cause for promotion or discharge. Its functions are only to employ, promote and discharge. There appears to be no conflict between our statutes and ordinances on this point, but rather we are of the opinion that Section 2825 quite directly bridges the candidate's requirement for residence within the City into a like requirement during his employment.

The inquiry of the Board of Education, as quoted above, we note asks merely whether there is anything in the Civil Service Act which prohibits employes living outside of the City, which we must answer in the negative. However, as your letter refers to our ordinance on the subject, this opinion has accordingly been broadened to constitute a complete answer, to the end that it is our opinion that City employees are

required to maintain their residence within the corporate limits in order to continue their employment.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Slot Machine Piano Player.

October 7, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Your letter of the 2d inst., with enclosures of (1) a report made to you by Lieut. William V. Blaul, and (2) copy of our communication to you of June 25, 1924, in reference to the temporary injunction issued by Judge Joseph B. David in the case of James O'Brien *vs.* Dever *et al.*, has been assigned to the writer for attention.

We are advised by the data that you have placed before us that one Mr. John Moran has outfitted the premises at 1914 North LeClaire avenue as a soft drink parlor; that in the said premises there is a room containing a combination player-piano and slot machine; that the said machine requires a deposit of 25 cents, for which music is played and simultaneously a slot machine is operated; that the alleged piano does not play music for every quarter inserted, but the slot machine feature of the machine always operates upon the insertion of the coin; that Lieutenant Blaul in his report declares:

“I played the slot machine by inserting 25 cents in said slot. It did not furnish any music nor any trade

checks or coin. I again played it and put 25 cents in * * * it paid four trade checks marked 'Good for one tune only' * * * I asked Mr. Moran would he cash these and he wanted to give me a dollar."

You wish to be advised whether or not the machine in question comes under the protective terms of the injunctional order issued on August 25, 1924, by Judge Joseph B. David.

As you were advised in our communication of August 25, 1924, "Judge David entered a temporary injunction restraining the police of the City of Chicago from interfering with the 'profit-sharing piano' in so far as it operates to furnish music for a consideration. * * * The court said that he would issue the injunction *only to restrain the police in case the piano was not a gambling device and did not pay varying amounts of coins or trade checks pending upon chance*, and that if the police officer sees the piano operate as a gambling device by paying out varying amounts of trade checks or coins, he should swear out a warrant against the owner of the place as a keeper of a gambling resort."

Section 1573 of The Chicago Municipal Code is in part as follows:

"No person shall keep, own, operate, use or cause to be kept, operated or used in any room * * * or upon any premises or any part thereof any * * * slot machine or other device of any kind or nature whatsoever, upon, in or by or through which money is staked or hazarded or into which money is paid or played upon chance or upon the result of the action of which * * * slot machine or other device, money or other valuable thing is * * * won or lost.

Any person violating any of the provisions of this section shall be fined not less than \$25.00 nor more than \$200.00 for each offense."

It is obvious from the report of Lieutenant Blaul which you have placed before us that the machine in question is a machine or device through which money is "played upon chance and upon the result of the action of which * * * money * * * is * * * won or lost."

It is our belief that the feature of the machine permitting the effusion of music as a result of the deposit of a coin is only incidental to the true character of the apparatus which is a slot machine.

It is therefore our opinion that this machine does not come within the terms of the injunctive order issued by Judge Joseph B. David in the *O'Brien* case, but on the contrary, violates Section 1573 of The Chicago Municipal Code of 1922.

Very truly yours,

BARNET HODES,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Extension of Time for Final Delivery on Contract.

October 7, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter of inquiry of the 2d inst., in which you desire the opinion of this office with respect to the power and authority of the Commissioner of Gas and Electricity to extend the time within which final delivery is due of malleable iron castings under a contract between the City of Chicago and the Western Electric Company, Inc., when there is contained in said contract a liquidated damage clause in event of failure to complete said contract on a day certain.

On page 20 of the contract in question there appears an article numbered 20 reading:

“Unavoidable Delay.

Art. 20. Should the Contractor be obstructed or delayed in the commencement, prosecution or completion of any part of said work by any act or delay of the City of Chicago, or by any act or delay on the part of railroads in furnishing cars or transporting said equipment, material or appurtenances for said work, by riot, insurrection, war, pestilence, acts of public authorities, fires, lightning, earthquake, cyclone, floods, or through any default or delay of other parties under contract with said City of Chicago, or due to strikes, *or to other causes*, which causes of delay mentioned in this article (Art. 20) in the opinion of the Commissioner of Gas and Electricity, are entirely beyond the control of the Contractor, then the time herein fixed for the completion of the work so delayed shall be extended for a period equivalent to the time lost by reason of any of the causes aforesaid, but no such allowance shall be made unless at the commencement of the delay the Contractor notify verbally the said Commissioner.” (Italics ours.)

It is to be noted by the above that if in the opinion of the Commissioner of Gas and Electricity a satisfactory cause exists which delayed the completion of the contract in due time, then a time equal to such period of delay may be added to the original date of completion.

We do not, however, consider it within the scope of the authority of the Commissioner of Gas and Electricity to arbitrarily fix a date for completion of a contract having a liquidated damage clause therein, which date is beyond the time mentioned in said contract, plus the period of “unavoidable” delay.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Beauty Parlors Located on Streets Zoned for Residential Purposes.

October 8, 1925.

HON. W. J. CONNORS, Superintendent, Department of License.

Dear Sir:

Your request for an opinion as to what action your department should take regarding the operation of beauty parlors on streets zoned for residences has been referred to me.

The second paragraph of your letter explains the practice of serving a notice to all people operating beauty parlors in a residence neighborhood, said notice requiring them to procure a license, and you state that "in nearly all cases an application for license is made and the fee deposited with the City Collector. The application is invariably returned by the Zoning Commission 'not approved' and the proprietor is then allowed to operate on the receipt for fee."

The Zoning Law, approved June 28, 1921, was amended June 20, 1923. As appears on page 268 of the Session Laws of 1923, that part of Section 3 of the 1923 Act governing your inquiry is as follows:

"Section 3. All ordinances passed under the terms of this Act shall be enforced by such officer of the state, village or incorporated town as may be designated by ordinance. * * *

Section 4 1/2 on page 271 of the same act provides as follows:

"Section 4 1/2. In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure or land is used in violation of this Act or of any ordinance or other regulation made under authority conferred there-

by, the proper local authorities of the municipality, in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful erection, construction, reconstruction, alteration, repair, conversion, maintenance or use, to restrain, correct or abate such violation, to prevent the occupancy of said building, structure or land or to prevent any illegal act, conduct, business or use in or about such premises."

We are quoting the above for the purpose of answering the third paragraph of your letter, which is as follows:

"My purpose in writing to you is to determine whether or not this department should bring the cases to court and force proprietors of such establishments to discontinue on the ground that they do not comply with the provisions of the Zoning Ordinance."

There is now in full force and effect an ordinance known as the Chicago Zoning Ordinance and all prosecutions for any violation of any of its provisions are controlled by Section 25, which provides:

"Section 25. ADMINISTRATION. This ordinance shall be enforced by the Commissioner of Buildings. The Commissioner of Buildings is hereby empowered and it shall be his duty to administer this ordinance in conjunction with the administration of such portions of the general ordinances of the City of Chicago as are commonly designated as the building code of the City of Chicago in such a manner as to facilitate their joint administration. For the purpose of enforcing this ordinance the authority vested in him under the said building code is hereby declared to be vested in him under this ordinance."

The principal reason for placing the duty of enforcement of the Zoning Ordinance (and incidentally, prosecutions for penalties under such ordinance) upon the Commissioner of Buildings is the fact that machinery is provided therein for appeals in cases which would work extreme hardship, and thereby it is hoped that not every case involving the collection of a small penalty will precipitate a suit involving the constitutionality of its provisions. Such being the case, we deem it proper to advise you that the parties aggrieved should

seek enforcement or relief, as the case may be, through the proper channels.

Yours very truly,

JAMES I. McCARTHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Withdrawal of Consent from Petition for Location of Filling Station.

October 8, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of October 6th.

Robert E. Burke, on August 13, 1925, filed a frontage consent petition with your department to install tanks for a gasoline filling station. The signatures on this petition were certified and reported on by the Superintendent of Maps on September 29, 1925. His report shows that there was a surplus of 8.11 feet.

Mr. Burke thereupon made a demand for the permit, but the permit was withheld by your department to enable the alderman of the ward to examine the frontage consent petition. Withdrawals of certain signatures have now been filed with your department, which, if counted, would reduce the frontage consents below the amount required by the City ordinance.

You wish to be advised whether you should recognize the withdrawal of these signatures, thereby reducing the frontage consents below the required majority under the law.

This department has uniformly held that a party signing a frontage consent petition required by the ordinances may withdraw that consent at any time before the petition for such consent has been formally acted upon and the permit granted.

This department's opinion has been based upon the following cases:

Littell v. The Board of Supervisors, 198 Ill. 205.

Theurer v. The People, 211 Ill. 296.

In the latter case the Supreme Court said:

“The right of a petitioner to withdraw his name from a petition at any time prior to the time the tribunal created by law to pass upon and determine the proposition submitted by the petition has finally acted is settled by this court in *Littell v. Board of Supervisors*, 198 Ill. 205. The petition in that case was filed under the act of 1895 for the creation of a new town. The court, on page 208, said: ‘Our examination of the decisions cited by counsel on either side from other courts on analogous statutes had led us to the conclusion that the act of signing such petition is not an irrevocable act, and that it may be revoked at any time before the jurisdiction of the body authorized to act has been determined by it. * * * To absolutely prohibit a citizen from withdrawing his name from a petition voluntarily signed by him, at any time after it has been presented to a body authorized to act upon it, would be a harsh and unreasonable rule and also liable to work great hardship. Generally, parties act from honest motives, and it is for the protection of the rights of such parties that laws are enacted and construed.’ The conclusion reached by the court in that case is supported by many decisions of other courts, and we think is in accord with the great weight of authority.”

There is nothing in the ordinance that precludes you from giving reasonable opportunity for the examination of frontage consent petitions by the public. If signatures on the

petition are withdrawn before you have acted upon the petition by the issuance of the permit, we think the law is clear that such withdrawals must be taken into consideration by you.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved :

LEON HORNSTEIN,
Acting Corporation Counsel.

**Exemption of Dormitory and School Building of
Educational Institution from Water
Rates.**

October 9, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

We find it necessary to again bring up the claim for exemption from water rates of the Columbia College of Expression, formerly located at 3358 Michigan boulevard and at 3405-9 Michigan boulevard.

On March 4, 1925, we sent a letter to you advising you that this institution was liable for water rates. The opinion was based on an investigation made by us which disclosed that the tuition and fees for each student in the institution was \$826 per year. We assumed from these facts that the school was a money making institution and this assumption led us into an error which we are now seeking to correct.

A strong protest was filed at the time the opinion was rendered to you and an argument was advanced by Mr. Rob-

ert McMurdy which caused us to send you word that you should withhold prosecution or other steps for collection of the rates until we could give the matter further attention. Later on we wrote to you saying that we would stand by the opinion originally given, again basing our decision on the fact that the tuition and fees collected were high and that therefore the school could not claim its exemption. We did not send you this second letter until after we had notified Mr. McMurdy of our intention to stand by our original ruling and had given him, as we supposed, ample time to take the matter up again. It seems, however, that he appeared here at one time when the writer was away, and owing to this fact did not get his second objection in before we sent the letter to you. Since then he has again appeared and this time has brought literature of the institution and its charter to prove that it is not organized for profit and that it is strictly an eleemosynary institution. We feel bound under these circumstances to change our ruling, although care should be taken to secure payment for the rates assessed against the part of the building that is rented out, of which we shall speak later on.

Our Supreme Court in the case of *City of Chicago v. University of Chicago*, 228 Ill. 605, held that the dormitories, dining hall and club house known as the "Reynolds Club" were exempt from water rates under the ordinance passed on May 19, 1902. It is true that the ordinance in force at that time was one directing the remission and cancellation of water taxes. That is to say, it was a mandatory provision. The present ordinance leaves a measure of discretion in the Commissioner of Public Works. We can, however, base no contention on this discretionary authority which says that the fees may be remitted if it shall appear to the satisfaction of the commissioner that the property is not used for gain or profit or for the purpose of producing revenue. In other words, the discretion which is vested in the commissioner is somewhat akin to the sound discretion vested in the courts, and must be exercised in a way that does not lead to discrimination.

The question presented, at first blush, does not seem to be free from doubt. It was held, in *First Congregational Church v. Board of Review*, 254 Ill. 220, that a parsonage, although the home for a pastor whose work is devoted entirely to the church, was not "property used exclusively for religious purposes," and the tax was sustained. The same ruling obtained in *People v. Muldoon*. In the case of *People v. St. Mary's Roman Catholic Hospital*, 306 Ill. 174, a similar ruling was made in the case of a hospital of a church organization. And finally, the Supreme Court held, in *Knox College v. Board of Review*, 308 Ill. 160, that the home of the college president and the residences occupied by college fraternities, whose members attend the college, were not exempt from taxation.

Such cases as we have just mentioned would lead us strongly to the view that the discretion of the commissioner might be exercised properly against the remission of water rates in the case before us, but it happens that in the last decision we cite the court distinguishes between all those cases and the case mentioned at first. The court says:

"It is also urged that the fraternity houses serve the same purposes as dormitories, and should be exempt under the reasoning of this court in *City of Chicago v. University of Chicago*, 228 Ill. 605. In that case there was a club house, called the Reynolds Club, which was situated within the university campus and was used exclusively by students and alumni for recreation, social purposes and student meetings, and this club house, with dormitories and other buildings, it was stated in the opinion, was used in the immediate carrying on of the educational purposes of the university. The fraternity houses here in question, however, are not shown by the evidence to be buildings created for the indiscriminate use of all the students, but are, as we understand the record, open only to the members of the respective fraternities, not by virtue of their college attendance but only upon election to membership in such fraternities under rules established by the societies themselves."

Knox College v. Board of Review, 308 Ill. 160.

We are convinced that the law applicable to the Columbia College of Expression is the one announced in the case

of *City of Chicago v. University of Chicago*. A showing is made to the effect that the buildings are used exclusively for educational purposes and the dormitory located at 3405-9 South Michigan boulevard is maintained (it is said) because the students of the school are almost wholly young women whose parents would not permit them to come to Chicago to live around at odd boarding houses without supervision. It is said that its maintenance is absolutely essential to the operation of the school.

It should be noted, however, that there is a building in the rear of 3405-9 South Michigan boulevard, occupied as a garage and a flat, which is rented out, which is subject to the water rates. This is admitted by Mr. McMurdy himself and we copy the following from his letter:

“In the rear of 3405-9 South Michigan Boulevard is a garage. This is what is referred to in the main paragraph on the second page of the enclosed opinion, but this is not material as we have never claimed that this garage was exempt from water taxes and I assume that water taxes have been paid on it from year to year.”

We, therefore, beg to advise you that the Columbia College of Expression and the dormitory are exempt from the water rates assessed against them, but that the building in the rear of 3405-9 South Michigan boulevard should be required to pay the water rates assessed against it. We return herewith three bills submitted to us in connection with this matter.

Very truly yours,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Alley in Rear of Federal Street.

October 10, 1925.

HON. JACOB M. ARVEY, Chairman, Sub-Committee of Committee on Judiciary.

Dear Sir :

Your request of the Corporation Counsel for advice upon the status of the alleys in the three blocks between 22d and 25th streets, Federal street and the right-of-way of the Chicago, Rock Island and Pacific Railroad was referred to me for answer.

The opinion of Mr. Harry F. Chaveriat, a former assistant corporation counsel, which you mention as being made the basis of a contention by the representatives of the New York Central Railroad Company that the alley is the property of that company, has been carefully considered, and we do not think that the positive conclusions arrived at in that opinion are necessary, or in all respects correct.

It is a memorandum opinion addressed to the Corporation Counsel for his consideration in this matter. It expresses only the writer's view. The records of the department do not show that the Corporation Counsel ever forwarded it to the Council, and that he did not adopt it is plain from the fact that the committee's knowledge of it comes from the New York Central representative's reference to this published opinion and that the ordinance is still pending before the council.

Attention is directed therein to the legal principles of the subject of dedication, and in the abstract may be correct, but in the instant situation as between the City and the claimant not conclusive against assertion of the interest and rights of the City.

The writer has personally made a careful investigation in the various divisions of the Department of Public Works,

and also a personal inspection of the land, in company with Mr. Otto Seyk, an investigator of this department, who is well acquainted with the vicinity. A letter from Mr. John D. Riley, Superintendent of Maps, informs us that the records of that bureau show that the alleys in the three blocks between West 22d and West 25th streets, Federal street and the right-of-way of the Chicago, Rock Island and Pacific Railroad were dedicated December 13, 1867, in Uhlich and Muhlike's addition to Chicago, etc., and that there is no record of a vacation of the alleys in question.

We found that at 22d street there is a parallel stone wall about one hundred feet long built on the west line of the lot. The strip of land is clear to 23d street. From the south line of 23d street, for about two-thirds of the length of the block, a platform for the loading of automobiles is connected by a switch with the railroad track. The remaining distance to 24th street is clear.

Again, on the south line of 24th street contiguous to and on the strip are a switch track, coal shed and chutes which also extend about two-thirds of the length of the block. The railroad has, at the location of these obstructions, physically closed to the public the alley strip. Also, part of its width is covered with earth forming the elevation embankment. The east line of the alley abutting on the lots of land has not been closed in any way except by the obstruction above described.

Before the elevation of the railroad tracks, the alley was open throughout its length from 22d to 25th streets, the streets crossed the strip and it was never closed to the adjoining vacant lots. It may be that evidence could be obtained which would show other public use of it while the streets were open across it. As the situation now is, the elevation stone abutments at each street line project upon a part of the width of the strip.

In these circumstances of the records and facts above detailed as to the physical conditions, we do not advise the vacation thereof on the terms now demanded by the New

York Central Railroad Company, but think that the company should furnish satisfactory proof that the City has no interest in the alleys and that they are the property of the New York Central Railroad.

The property west of the tracks was divided off by the plat of the subdivision in precisely the same manner as that on the east. We know of no claim or suit that brought into question the rights of the City west of the tracks, but on the contrary, such action as was taken indicated that the alleys west of the tracks were recognized as public alleys. There were two vacations of parts of alleys west of the tracks which seem to have been predicated on the theory that the alleys were public. Such being the case, we do not believe the New York Central Railroad Company can successfully maintain a suit to dispossess the City of these similar alleys east of the tracks.

Yours truly,

CORA B. HIRTZEL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Parking of Automobile Before Private Residence.

October 10, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your letter of the 7th inst., to which you attached letter from Alderman Wiley W. Mills, wherein he asks for the issuance of a police order to prevent the parking of automobiles in front of the home of L. R. Wallance, 37 North Central avenue.

Answering your request for an opinion as to whether or not such an order should properly be issued by your department, we quote below an opinion heretofore rendered by this office on March 28, 1924, to Hon. U. S. Schwartz, Chairman, Committee on Local Transportation, which deals directly with the subject-matter:

“We have your letter of February 27th, requesting the draft of an ordinance to conform to an order rescinding a council order passed January 23, 1923, p. 1681, directing the removal from streets and sidewalks in the city of all “No Parking” signs except from places where parking is prohibited. We understand the purpose of the rescission to be a desire to permit the placing of such signs under such conditions and regulations as the City Council may by the proposed ordinance prescribe.

We have not prepared such an ordinance or amendment to any existing order, for the reason that the rights and liabilities of interested parties must be determined judicially and may not be lawfully defined by any legislation of the city council. To permit the placing of such signs by abutters would add nothing to the abutters’ already existing right, and to prohibit them could, and would in our opinion, in many cases, deprive abutters of vested incorporeal property right, any attempted diminution or confiscation of which would be a taking of property without due process of law, and consequently unconstitutional.

It is fundamental that apart from his right in and to the use of the street as a member of the general public, the abutter is vested with an easement or right of access to his premises. This is so far regarded as private property that not even the legislature can take it away.

City of Chicago v. Chicago, etc., Assn., 102 Ill. 379.

The abutter, of course, may not use his premises or his right of access beyond his reasonable requirements, and any restriction he might seek to impose must be a reasonable protection of his property rights and not merely a capricious prejudice against the free use of the street by the general public. Whether or not his attempted enjoyment of the easement of access is a reasonable exercise of his right must necessarily be a question of fact in each case, and what is reasonable in one case, might be grossly unreasonable in another.

We doubt, therefore, if a practicable ordinance affording the relief desired could be sustained."

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Over-Payment of Pension Beneficiary.

October 10, 1925.

THE RETIREMENT BOARD, Municipal Employees Annuity & Benefit Fund.

Gentlemen:

Replying to your inquiry as to whether or not you have a right to ask the Workmen's Compensation Bureau of the City of Chicago to withhold further payments of benefits due Mary C. Smith on her award and pay the same over to your fund in order to balance her account owing to overpayment made to her therefrom, as compensation annuity, the following is submitted:

Section 21 of the Workmen's Compensation Act, being Section 158 of Chapter 48 of the Revised Statutes of Illinois provides, among other things, as follows:

"No payment, claim, award or decision under this Act shall be assignable or subject to any lien, attachment or garnishment or be held liable in any way for any lien, debt, penalty or damages."

The Municipal Employees' Annuity & Benefit Fund Act provides for the payment of "compensation annuity" to widows under certain circumstances and requires the City to

provide the funds necessary to pay such compensation annuity.

While the Workmen's Compensation Act provides, in the above quoted clause, that an award shall not be held liable in any way for any debt, etc., it certainly does not mean that where an employer overpays the recipient of an award that such employer cannot deduct such overpayment from future installments.

In the present case the City of Chicago has paid to Mrs. Smith an award under the Workmen's Compensation Act and "compensation annuity" under the M. E. A. & B. Fund Act, and in the course of such payments, through misadventure, has overpaid Mrs. Smith. Because of the subsequent marriage of Mrs. Smith, it is not now possible for any deductions to be made or payments withheld on her "compensation annuity" award, but as payments are still due under her workmen's compensation award, I believe that the City can properly withhold further payments of compensation until the City has recouped the overpayment heretofore made to Mrs. Smith and transfer such withheld payments to the "compensation annuity" fund of the M. E. A. & B. Fund out of which such overpayments were made.

This question does not appear to have been passed upon by any of the courts so far as I am able to find, and as it is a question of protecting the Municipal Employees Pension Fund, I would recommend that further workmen's compensation payments be withheld by the City until Mrs. Smith's account balances, or until some court of competent jurisdiction shall decide that such a course cannot be followed.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Boxing Exhibitions.

October 10, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

Replying to your inquiry of October 8, 1925, relative to amateur boxing exhibition conducted by the Belleplaine Athletic Club, 3947 Lincoln avenue, on Tuesday evening, October 6, 1925, you are advised as follows:

It is unnecessary to state whether or not the proceedings described was a "prize fight" under the laws of Illinois. The question is was it a "boxing exhibition," or was it a "sparring or boxing exhibition."

Section 493, Chapter 38, Cahill's Illinois Revised Statutes of 1923, reads as follows:

"493. BOXING EXHIBITION—PROMOTERS—WITNESSES.)
Sec. 235. Whoever instigates, carries on, promotes or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding \$500, or confined in the county jail not exceeding six months."

It will be observed that there are no exceptions or limitations in this section, nor are there to be found any exceptions or limitations relating to boxing or sparring exhibitions in any other part of the statutes.

Accordingly it is of no importance whether the exhibition be "amateur," professional or of any other description.

This exhibition was public and an admission fee was charged. These circumstances would give it the same characteristics of a prize fight, but under Section 493 above quoted it is immaterial whether the exhibition be public or private,

free or subject to an admission fee, in any case it would be unlawful.

Likewise the inhibition is not grounded upon the good or bad conduct of those in attendance or anyone else.

The character of the organization, whether public or private chartered by the state or otherwise, had nothing to do with the legality or illegality of the exhibition. Nor is it of controlling importance that prizes or rewards were or were not offered or given.

So far as has been ascertained, our courts of last resort have not been called upon to construe this section of the statute, but there is nothing ambiguous about the language and no reason appears why the statute should not be construed exactly as it reads.

The statute provides two methods of dealing with violations. The first, as provided in Section 493, being arrest and fine of "whoever instigates, carries on, promotes or engages in as a witness." The second is outlined by Section 484 and consists of a complaint made "before any judge or justice of the peace" (that some person or organization) "appear to be about to engage in any such fight or sparring or boxing exhibition." Whereupon those complained of "may be compelled to enter into bond with security to keep the peace, as in other cases of threatened breaches of the peace."

Yours very truly,

JOSEPH J. THOMPSON,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Notice to Disabled Firemen Concerning Proposed Retirement.

October 13, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

In your communication of September 24, last, you state that:

“In cases where injured and sick firemen who have been on the payrolls of their respective companies and unable through such injuries or sickness to do any work for the city for periods running over three months with full pay, and where Dr. David J. Jones, City Physician, makes a certificate to this office setting forth a man's condition and recommending his retirement to the Pension Fund, the enclosed letter is read to each fireman *so as to permit him to make his pension application and resign from the Department without being formally served with the letter; in other words giving him a chance to apply for a pension in place of discharging him.*”

You ask: “Is this procedure correct?” This procedure is so far the same as that which appears in the case of *O'Connor v. Harding et al.*, 224 Ill. App. 198, as to come squarely within the decision of the Appellate Court that the resignation of a civil service employee obtained by any such threat of discharge is wholly illegal and invalid. Such resignation, therefore, may be repudiated and one's reinstatement in the service may be enforced by mandamus, as was done by the Appellate Court in the *O'Connor* case.

The Civil Service Law itself, by Section 12, prescribes the only procedure by which one in the civil service may be lawfully discharged. That provision is as follows:

“Sec. 12. REMOVALS. No officer or employee in the classified civil service of any city who shall have been appointed under said rules and after said examination, shall be removed or discharged except for cause upon written charges and after an opportunity to be heard in his own defense. Such charges shall be investigated by

or before said civil service commission or by or before some officer or board appointed by said commission to conduct such investigation. The finding and decision of such commission or investigating officer or board, when approved by said commission, shall be certified to the appointing officer, and shall be forthwith enforced by such officer. Nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days."

It is obvious that heads of departments and superior officers have power to suspend but not to discharge a civil service employee. The Civil Service Commission alone has power to discharge such employee, and then only upon "written charges and after an opportunity to be heard in his own defense."

Thomas v. City of Chicago, 273 Ill. 479.

City of Chicago v. Luthardt, 191 Ill. 516.

People ex rel. Jacobs v. Coffin, 282 Ill. 599.

The second question asked is, "Should not the Civil Service Commission also send a notice of retirement to these men?" This must be answered in the negative for two reasons: first, because the commission has no jurisdiction to send notice of retirement from the civil service to any fireman unless he has been duly tried and discharged in the manner prescribed by this section of the Civil Service Act; and secondly, because such notice, if so sent, would vitiate any subsequent proceeding had before the commission on formal charges for dismissal.

There seems to exist a misconception of the scope and purpose of Section 9 of the Firemen's Pension Act which is quoted in this letter directed to sick and injured firemen. There is nothing in this Section 9 affecting a fireman who
 "shall become and be so physically or mentally disabled
 as to render necessary his retirement from active service"

that empowers the Board of Trustees of Pensions, the City Physician or the Fire Commissioner or all of them to discharge a fireman from the department. The trustees can only suspend temporarily, and the same Section 9 provides that

“If, after placing a fireman on the pension roll, the board shall become satisfied that such retired fireman has recovered from such physical or mental disability, said board shall order the suspension of the payment of his pension and that said fireman report back to the marshal, or chief of the department of such city, who shall thereupon order the reinstatement of such fireman in active service in the same rank or grade that such fireman held at the time of his retirement.”

The only power that exists to permanently retire or discharge a fireman who is in the civil service of the City is that given to the Civil Service Commission by Section 12 of the Civil Service Act above quoted, to be exercised only in the manner therein stated. Written charges of permanent physical or mental disability must be preferred, and an opportunity afforded the fireman to be heard in his own defense. Any other procedure to force such retirement would, for the reason and authority here presented, be illegal.

There occurs to us but one possible exception to this established rule of the Civil Service Law which would permit the procedure by the Fire Commissioner and also the Civil Service Commission of sending out the letter here presented for the retirement of a fireman, and that is in case the City ordinance so defined the position and fixed the qualifications therefor, as for instance, that upon attaining the prescribed maximum age such fireman should no longer be eligible for service, for then the record of itself would be sufficient to determine the fact and retire such fireman. But whenever the cause of retirement may be denied and made an issue of by the civil service employee, such issue can lawfully be determined only by the Civil Service Commission in the manner already pointed out.

Very truly yours,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Exemption from Water Rates of State Institutions of Learning.

October 13, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

I have your communication of October 3, 1925, referred to this department, wherein you state that "premises 511-15 South Lincoln street, College of Physicians and Surgeons; 500-516 Honore street, College of Medicine, University of Illinois; 1834-42 West Harrison street, College of Dentists, University of Illinois; 701-7 South Wood street, University of Illinois School of Pharmacy; 721-5 South Wood street, Institute for Juvenile Research, University of Illinois, have heretofore been exempt from the payment of water rates on the records of the Bureau of Water. These premises are all owned by the State of Illinois, which has also recently erected a building at 1801-51 West Polk street, to be used as a research laboratory," and you ask for an opinion "as to whether this last mentioned premises should be legally exempt under Section 4128 of The Chicago Municipal Code of 1922 and what action should be taken to collect water rates from the first five mentioned premises which have been exempted in accordance with Section 2755 of the Code of 1911."

The ordinance above referred to as Section 4128 of The Chicago Municipal Code of 1922 reads as follows:

"4128. PROPERTY THAT MAY BE EXEMPTED FROM PAYMENT OF WATER RATES.) The commissioner of public works may exempt from the payment of water rates property herein enumerated as follows:

(a) Such property as is used in the immediate conduct or carrying out of the purposes of any charitable, religious or educational institution, if application be made for such exemption to the commissioner of public works in the form prescribed by him, and if it shall appear to

the satisfaction of said commissioner that such property is not used for gain or profit, or rented, conducted, operated or maintained for the purpose of producing revenue. As a prerequisite for the granting of such exemption, the commissioner of public works shall upon demand be provided with access to the financial records of such institution. Nothing contained in this paragraph shall be held to exempt property of the United States of America, of the state of Illinois, or of any of its political subdivisions except as hereinafter mentioned.

(b) Such property of the state of Illinois as is used for an armory by the state or federalized national guard."

It would appear from the foregoing that it was the intention of the City Council at the time of the adoption of the Municipal Code to specifically exclude all property of the State of Illinois from the benefit of exemption from payment of water rates except "(b) Such property of the State of Illinois as is used for an armory by the State or federalized national guard," and we are of the opinion that all users of water on the premises herein above enumerated should be required to pay for same from the time of the passage of an ordinance revising and codifying the general ordinances of the City of Chicago, viz: November 22, 1922.

The ordinance above referred to as Section 2755 of The Chicago Code of 1911, provides:

"The Commissioner of Public Works shall remit and cancel all water rates and charges heretofore levied and assessed or which may hereafter be levied and assessed against such property of any charitable, municipal, religious or educational institution in the City as is used in the immediate conduct or carrying on of the charitable, municipal, religious or educational purposes of such institution and which is not used for gain or profit or rented, conducted, maintained or operated for the purpose of producing revenue for such institution."

From the foregoing section, we are of the opinion that the Commissioner of Public Works was justified in exempting the first above five mentioned premises from the payment of water rates up to the time of the passage of the ordinance now in force and effect.

The only way in which a claim against the State of Illinois can be adjusted is by filing such claim in the Court of Claims of said State of Illinois.

We would suggest that bills for the use of water be presented to the officers of the above mentioned institutions covering the period from said December 31, 1922, to date.

Respectfully submitted,

THOMAS W. FLYNN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Filling Station on Site Opposite Church.

October 13, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

The receipt is acknowledged of your communication of October 2d requesting the views of this department.

Application, you state, has been made to install tanks for a gasoline filling station at 1451-1459 West 51st street. Frontage consents were filed as by law required, which show a surplus of 146.17 feet. Included in the frontage consents which were filed were consents covering 266.15 feet signed by the "Association of Franciscan Fathers," an unincorporated religious organization.

The site of the proposed filling station is across West 51st street from a square block of property owned by the "Association of Franciscan Fathers."

You state that, in conformity with Paragraph (b) of Section 2279, you have refused the application for a permit to install the tanks, as the site is directly across from the prop-

erty of a church and school, but that you are informed a council order will be passed authorizing the issuance of the permit.

You inquire whether you would be justified and within your rights in issuing this permit in view of the fact that the Association of Franciscan Fathers have given their consent thereto and that a council order will be passed authorizing the permit.

You also enclose copy of a letter addressed to your department by George O. Hunt and Paul K. Barsaloux concerning an exactly similar situation regarding a proposed gasoline filling station at the northeast corner of 73d street and Cottage Grove avenue.

Paragraph (b) of Section 2279 of The Chicago Municipal Code of 1922 forbids the installation of any tank for the storage of the liquids mentioned therein, "in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater."

If it is proposed to install tanks for a gasoline filling station in a place which falls within the above prohibition of the ordinance, we are constrained to advise you as a matter of law that you would not be justified in issuing a permit because a council order may be passed authorizing it.

The Illinois Supreme Court has so definitely decided the question that a council order is ineffectual to repeal, suspend or set aside the provisions of an ordinance, that the question is settled in Illinois, as shown by numerous decisions (*Hibbard & Company v. City of Chicago*, 173 Ill. 91; *C. & N. P. R. R. v. City of Chicago*, 174 Ill. 439; *People v. Mount*, 186 Ill. 560; *People v. Thompson*, 209 Ill. App. 507).

For the reason that the law is as it is, every corporation counsel for the last 20 years has had no alternative except to advise the various department heads of the City that, in the issuance of permits, they must as a matter of law be guided solely by the ordinances of the City, and that a permit issued

upon a council order, where it is virtually a license to an individual to violate a City ordinance, confers no legal rights upon the grantee of such permit, and that such a council order is without force to waive a prohibition contained in an ordinance. April 23, 1925, in response to a communication from you, we advised you to the same effect.

Neither would you be justified, in our judgment, in issuing a permit to install tanks for a filling station in a place which falls within the prohibition of Paragraph (b) of Section 2279, even though the owners or authorities of the church, school, hospital or theater may consent to it.

We do not believe it is the law that, where there is an absolute prohibition in an ordinance and no conditions are provided that might waive the prohibition as in this case, that the church, school, hospital or theater owners or authorities have the power to waive it. The prohibition is there for the benefit of the public—to safeguard them from the danger of fire, explosion, etc. The prohibition is not there for the benefit of the church, school, hospital or theater authorities or owners. They therefore, in our judgment, cannot waive it.

The plain purpose of the ordinance is to prevent danger from fire or explosion to those who may be in buildings used for schools, hospitals, churches and theaters, and to protect human life in a place used for any such purposes where a considerable number of persons frequently gather.

No opinion having been requested as to whether the proposed filling stations do fall within the above prohibition of the ordinance, we are expressing no opinion in relation thereto, but are confining this communication to the two questions you have specifically presented to us by your letter.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Interpretation of Section on Garages in Zoning Ordinance.

October 15, 1925.

To THE HONORABLE, the Board of Appeals.

Gentlemen :

This will acknowledge receipt of your letter of October 14th requesting that an opinion be rendered to the Board of Appeals as to the proper interpretation of Paragraph K of Section 2 of the Chicago Zoning Ordinance.

The said Paragraph K reads as follows:

“(K) GARAGE—A public garage, except as otherwise provided by this paragraph, is a building or premises arranged, designed, and intended to be used for the storage of motor vehicles for hire or reward, or which does not come within the definition of a private or community garage as herein set forth. A private garage is a building with ground area not in excess of 800 square feet arranged, designed, and intended to be used for the storage on the ground floor of not more than 4 individually owned passenger automobiles devoted to the private use of the owner, when such garage is located on the same premises, as an auxiliary use, with the residence or apartment or business of the owner of such automobiles so stored, and where no fuel is sold. A use as a private stable shall be subject to the same ground area regulations for the purposes of this ordinance as the regulations controlling the ground area of a private garage. Where two or more separate private garages, each having a ground area not in excess of 200 square feet, are located on the rear half of the premises, not more than one of such garages having a vehicle entrance on a public street, such garages collectively shall be deemed a community garage, but a group of two or more private garages on a single lot not so located or arranged or any one of which is in excess of 200 square feet in area shall be deemed a public garage.”

The Zoning Ordinance provides for the character of garages permitted in the different use districts. Only a private

garage may be allowed in a residence district, a private or community garage in an apartment district, and a private, community, or public garage in a commercial or manufacturing district.

To distinguish between these different types of garages, the ordinance by Paragraph K of Section 2 undertakes to define each kind.

A private garage is one where no fuel is sold. Its ground area must not be in excess of 800 square feet, and it being designed or intended to store on the ground floor not more than four individually owned passenger automobiles, such automobiles to be devoted to the private use of the owner, and located on the same premises as an auxiliary use, with the residence or apartment or business of the owner.

A community garage we interpret to be a collection of two or more separate private garages, or separate stalls for two or more automobiles, each being not more than 200 square feet in ground area, located on the rear half of the premises, and not more than one of such separate garages or separate stalls having a vehicle entrance on a public street.

All other garages, or groups of private garages, are to be regarded as public garages for the purpose of the Zoning Ordinance under the provisions of said Paragraph K.

We appreciate, of course, that any general interpretation given to you of Paragraph K by this department might not at all cover a particular situation or state of facts you have in mind.

If, however, you will advise this department the specific facts in the case to which you think the said Paragraph K may or may not be applicable, we will be glad to give you our best judgment as to the applicability of Paragraph K to the said situation.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Amateur Boxing Bouts.

October 16, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir :

Replying to your inquiry pertaining to Commanding Officer Patrick Kelliher's communication, relative to boxing exhibition at Mullen & McGoorty's Gym., 175 West Madison street, will say that the boxing exhibition described undoubtedly violated Section 493 of the Criminal Code, as set forth in Cahill's Illinois Revised Statutes, Chapter 38, which reads as follows :

“493. BOXING EXHIBITION—PROMOTERS—WITNESSES.)
Sec. 235. Whoever instigates, carries on, promotes or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding \$500, or confined in the county jail not exceeding six months.”

This statute forbids any kind of a sparring or boxing exhibition.

It is quite evident that there is an impression prevailing to the effect that some kinds of “amateur” boxing or sparring bouts or exhibitions are permissible and even some of the courts have been influenced by this impression, although it is an entirely mistaken one. No kind of a sparring or boxing exhibition is lawful in this State.

Since, however, this impression has gained such a wide acceptance, it would seem advisable for the commanding officers to notify all persons or clubs known to them or suspected by them to be contemplating sparring or boxing exhibitions of any kind, that such exhibitions are unlawful and would subject all participants to liability for arrest and punishment, regardless of any former actions or representations made by any one, and if, after such notice, any individual or

club proceeds to give or conduct any such exhibition, police action should be taken to prevent or punish participants.

It is to be noted that this law does not prevent clubs from carrying on any kind of legitimate work, including physical exercises and athletics of various kinds, but it does prohibit sparring and boxing exhibitions of any and every kind.

Very truly yours,

JOSEPH J. THOMPSON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Transfer of Funds to Sundry Accounts of Board of Local Improvements.

October 20, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller

Dear Sir:

You advised us in a recent letter that sundry appropriations for the Board of Local Improvements are overdrawn to the extent of \$67,865.11, and that the board has no means of making the necessary transfers so as to meet these obligations. You further inform us that vouchers totaling \$327,-373.91 were turned over by the Board of Local Improvements and credited to the corporate fund as reimbursements for expenses for which five per cent levies were made. And in addition to this you say that other vouchers for \$39,738.98 for rentals of buildings on South Water street and for \$3,925 for wrecking of buildings were also turned in to the general corporate fund.

The question arises whether it is possible, in view of these payments, totaling \$371,087.89, to make such disposition of a part of this money that the request of Mr. Sloan, president of the board, to make a transfer in order to meet the overdraft referred to.

This department has always adhered to a liberal interpretation of the provision in Section 2-a of Article VII of the Cities and Villages Act, concerning the making of transfers. But we know of no way in which a transfer can legally be made from the moneys thus obtained to the funds that have been depleted.

If you could find, among the appropriations from the general corporate fund, where the shortage exists, any item which covers an expense for which reimbursement as above stated has been made, we would be disposed to hold that the money heretofore expended had been paid out of the five per cent levy, and that therefore the appropriation was still available and could be transferred. While even this would be a stretch of the power of making transfers, because the statute expressly says that the money so collected can be turned into the general corporate fund *only by way of reimbursement* (Art. IX, Sec. 94), we think we could justify such a course. But we do not believe that such a condition exists as to any appropriations made during the current year.

We are therefore constrained to hold that the proposed transfer of the necessary amount from the funds thus received cannot be lawfully accomplished.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Dredging of North Branch by The Sanitary District of Chicago.

October 22, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We are in receipt of your letter in which you state that the Federal Government contemplates dropping the work of dredging the north branch of the Chicago river. You state further that the filling in of the branch is due very largely, if not entirely, to the silt that comes in with the sewage and drainage brought through there by the Sanitary District. The question you ask is whether the responsibility lies on the Sanitary District of Chicago to keep the channels used for drainage purposes dredged and open so that they can be used as they were used prior to their being obstructed in this way.

We judge from your letter that the complaint you make is of long standing. It appears that the Federal Government up to six years ago pursued its dredging program much further than North avenue, but that during the last six years it extended it only as far north as North avenue. It appears further that before the north branch was used by the Sanitary District no difficulty whatever existed in keeping the channel open, and the dredging was done under the supervision and at the expense of the Federal Government. It would seem that the proposed stopping of the work that is now being conducted by the Federal Government is due to the fact that there is an increase in the deposits which require dredging and that such stoppage will bring on a situation that will be expensive to the City unless the Sanitary District takes care of it.

There is no doubt whatever that the Sanitary District has the requisite power and authority to meet this situation, and we believe it is bound under the law to keep the channels used by it open and in as efficient condition for the purposes for which they are used as they were before the Sanitary District began its operations in them. Otherwise there might be a serious clash of interests as between the two municipalities.

Section 7 of the Sanitary District Act gives the board of trustees power to construct and maintain one or more main channels, drains, ditches, etc., and in addition thereto such adjuncts as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed in a satisfactory manner. Sections, 16, 17, 19 and 20 cover, among other things, provisions for damage that may be done to private or public property. The whole tenor of the statute which empowers it to function contemplates that it shall do so in such a way as to impose no additional burdens upon private or public property. In other words the statute does not sanction such a method of procedure on the part of the Sanitary District as will fill up the harbor of the City of Chicago and render it useless for the purposes that it has been used.

While this matter did not require attention up to this time because the Federal Government was doing the necessary dredging, if it becomes likely that such work will be stopped, it will be entirely proper for you to take up with the Board of Trustees of the Sanitary District of Chicago the question of removing the silt or other obstructions which it is placing in the channel.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Erection of Auto Shed on Rear of Residential Lot.

October 20, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of October 19th. The owner of the premises at 1532 Birchwood avenue secured a permit to erect a frame auto shed on the rear of the lot. The said lot (which was known as Lot 8, in Block 3 of the Birchwood Subdivision, Section 29, Township 41, Range 14 E) extended from Birchwood avenue to Rogers avenue and nowhere was intersected by an alley.

Complaint was received by your department that the frame auto shed was being erected on a street frontage—that is on Rogers avenue—and you thereupon stopped the work.

The owner of the lot has now had made an assessor's subdivision of the lot, plat of which you enclose. This plat shows that the lot now has been subdivided, for taxation purposes, into two lots, one of which lots now fronts on Rogers avenue and the other now fronts on Birchwood avenue, the latter not now extending for 104 feet north from Birchwood avenue.

The owner of the lots claims the right to put the frame auto shed on the rear of the new lot which, as now subdivided for taxation purposes, fronts on Birchwood avenue. This new lot, as shown by the Sanborn map, has a building upon it which fronts on Birchwood avenue.

Paragraph (f) of Section 875, which covers the situation, reads as follows:

“(f) Frame auto-sheds housing not to exceed two auto cars may be erected inside the fire limits of area not to exceed 400 square feet. Such auto-sheds shall have an incombustible roof and shall have a concrete floor not less than 4 inches thick laid directly upon the ground. At the time of applying for a permit for such auto-shed applicant shall submit a plat of the lot showing the loca-

tion of same made by a licensed surveyor and giving the established grade of the alley upon which such auto-shed shall open. Such shed shall not exceed 14 feet in height and shall be situated on the rear of the lot, shall be used for the purpose of housing automobiles only and there shall not be more than one such shed on any lot or premises."

The above section provides that a frame auto shed shall be situated on the rear of the lot.

"As commonly understood, the rear of a lot is that portion abutting upon the alley, and the front is that portion opposite the rear of the lot which faces upon the street. * * * In the strict sense of the term, that portion of the lot only which is opposite the rear and faces upon the street is properly designated as the front of such lot (269 Ill. 169)."

By the same process of reasoning the rear of the lot is that part of the lot which is opposite the front, the front of the new lot in this case as now subdivided being on Birchwood avenue.

It is true that no alley intersects this particular lot, but that in itself should hardly preclude the owner of the lot from having the same privilege of erecting a frame auto shed upon the rear of his lot as have the owners of other lots that have alleys in the rear thereof.

We think the proposed frame auto shed may properly be erected on the rear of the new lot which as now subdivided for taxation purposes fronts on Birchwood avenue. The auto shed could then be nowhere closer than 27 feet to Rogers avenue, would be on the rear of the lot fronting on Birchwood avenue and could not be regarded as being constructed on the front of a lot which fronts on Rogers avenue.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Payment by Surety Company for Defalcation of Clerk
in Comptroller's Office.**

October 20, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your letter of recent date, in which you state that the United States Fidelity and Guaranty Company forwarded to the City Comptroller a check in the sum of \$5,000 to cover its liability as surety for Daniel J. Lynch, formerly acting as judgment clerk in the said Comptroller's office.

You state that it appears from the records that Mr. Lynch was short in his accounts to the extent of some \$25,0000, and that you are informed that the case is pending before the grand jury. The question you ask is, whether it is proper to accept the payment of the surety company at the present time, since intimations have been made to the effect that there might be a settlement of the shortage to avoid prosecution.

If the sum of \$5,000 covers the penalty of the bond on which the United States Fidelity and Guaranty Company was surety, we see no reason whatever for refusing to accept payment. There is no law which jeopardizes the interests of the City in case the payment is accepted. In the case of joint tortfeasors it is sometimes not advisable to accept a settlement from one of the parties unless the whole liability is covered, but this does not apply in the case of a principal and surety on a bond. The surety is liable, in any event, only to the extent of its bond, and the payment of that amount does not release the principal if the liability against him is greater than the amount of the bond.

We are informed that you have some doubt as to whether you would have the right to draw against the money thus received in order to pay sums appropriated out of the fund

from which the money was embezzled. On this point, it would be an extremely technical construction of the law to say that the money was actually expended when in fact it was wrongfully taken and is now being replaced in part. We believe it would be entirely proper to regard the withdrawal in the first instance as but a temporary withdrawal, and the money received from the surety company could be used to restore the fund so that payments can be made from it.

We recommend that you make such disposition of same as to make it available for the purposes for which it was originally appropriated.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Application of Employee of Board of Education to be Restored to Civil Service Rank.

October 20, 1925.

HON. WILLIAM F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

In the matter of the written request of Margaret M. Cunniff "to be certified to a position of Assistant Chief Clerk recently created by the Board of Education," you submit a memorandum of facts, together with the letter of request for such certification, and ask for an opinion thereon.

The facts so far as they are material to the case are that the position of assistant chief clerk was not created by

the Board of Education, which alone had the power to create it, until *June 24, 1925*, whereas on *March 20, 1925*, the City Civil Service Commission had formally and officially stricken off the names of candidates from the eligible register for the position of assistant chief clerk upon which appeared the name of this applicant, Margaret M. Cunniff, or the only woman eligible. This list had been posted since *March 19, 1923*, and the names had "remained thereon more than two years." The position of assistant chief clerk in the Department of Education not having been created until *June 24, 1925*, there could not have been any classification of the position by the Civil Service Commission, the filling of the position could not have been requested by the head of the department, nor could any certification of an eligible have been made before the cancellation of this eligible list by the commission.

We are of opinion that under this state of facts it is impossible, regularly and legally to grant the personal request of Margaret M. Cunniff "to restore the list and certify (her) to the position of assistant chief clerk.

Section 10 of the Civil Service Act expressly provides that:

"Said commission may strike off the names of candidates from the register after they have remained thereon more than two years."

Pursuant to Section 4 of the Civil Service Act the Civil Service Commission adopted the following rule:

"Sec. 6. EXPIRATION OF REGISTERS. Eligible registers shall expire by limitation of time in two years and one day from the date of posting thereof, unless the Commission before the expiration of such time on any register shall order otherwise."

This eligible list having terminated by operation of the Civil Service Law and the existing rules of the Civil Service Commission even before the position of assistant chief clerk was created, the requisition of the Board of Education for the filling of such position could not be legally complied with by certification from this defunct list; much less has the Civil

Service Commission the power to restore the list and certify the applicant as here requested.

It cannot change the legal status of the case that in October, 1924, the Superintendent of Schools recommended the creation of the position, and that such recommendation was approved by certain committees, before the Board of Education created the position. The Civil Service Act applies alike to employees of the Board of Education and to all the civil service employees in other departments.

Yours very truly,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Disposition of Money Saved by Firemen from Destruction by Fire.

October 24, 1925.

HON. ARTHUR R. SEYFERLICH, Chief Fire Marshal.

Dear Sir:

Your request of the 19th instant for an opinion as to what disposition should be made of the \$19 in paper money which was removed by your battalion marshal for preservation from destruction by fire from the premises at 1124 Milwaukee avenue has been received.

Section 1182 of the ordinances of the City of Chicago (Council Journal, May 21, 1924, page 3077) reads as follows:

“REMOVAL OF PROPERTY.) The chief fire marshal or officer in command, shall have power to cause the removal

of any property, whenever it shall become necessary for the preservation of such property from fire, or to prevent the spreading of fire, or to protect adjoining property."

And Section 1220 of The Chicago Municipal Code of 1922, page 357, provides:

"(PROPERTY SAVED.) No person shall be entitled to take away any property in the possession of the fire department saved from any fire until he shall make satisfactory proof of ownership thereof."

It thus appears that under Section 1182 aforesaid, your department was empowered to remove said money to preserve its destruction from fire and that under said Section 1220 it is your duty to retain possession thereof until such time as someone shall make satisfactory proof of his ownership thereof.

Yours very truly,

W. ARNOLD AMBERG,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of City to Street Railway Company for Removal and Replacement of Tracks.

October 27, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In response to your communication of July 6th last, requesting this office for an opinion as to whether or not the City is liable to the Chicago Surface Lines for the cost of removing the street car tracks from the old Roosevelt road

viaduct and replacing them on the temporary viaduct immediately west of the river, our conclusion is that the City is not so liable for the reasons hereinafter indicated.

The temporary viaduct, as we understand it, is constructed over the tracks of the Baltimore & Ohio Chicago Terminal R. R. Company, and is the connecting link between the Union Station viaduct and the bridge spanning the river. Roosevelt road from the west dock line of the river to Canal street is almost entirely taken up by railroad tracks, and the overhead viaducts accordingly necessitated. The tracks, except those belonging to the B. & O., are the property of carriers using the Union Depot, and the Union Station Company, under its ordinance, was required to and did reconstruct the viaduct over such tracks to conform to the Roosevelt road widening.

The Baltimore & Ohio Company takes its rights at that point under an ordinance granted to the LaSalle & Chicago Railroad Company May 13, 1872, to the rights of which company the B. & O. subsequently succeeded. Under Section 4 of that ordinance, the grantee, and its successor, the B. & O., was required, as an express condition of the grant, to erect viaducts over its tracks on any of the streets which may be crossed by its tracks where and whenever the City Council might so require. Pursuant to this section the old Roosevelt road viaduct over the B. & O. tracks was built. The obligation to so construct and maintain the viaduct is a continuing duty, and it was proper for the City to require the reconstruction of the viaduct to conform to the Roosevelt road improvement. For purposes, apparently of expediency and economy in construction, the B. & O. has not been required to do the actual work of construction, but by an amendment (June 3, 1918), to the Union Station Ordinance, the latter company agreed to construct the entire viaduct from the west dock line of the river to Canal street, and by Section 3 of the same amendment the B. & O. Company agreed to pay the station company the cost of such viaduct from the river to the dividing line between the B. & O. and the Ft. Wayne tracks, a span of something over two hundred feet, and the

B. & O. further agreed to pay the cost of relocating sewers and public utility facilities and equipment necessitated by the building of the viaduct.

Subsequent to the passage of this amendment, and prior to the commencement of the actual construction of the disputed span, the river straightening project took sufficiently definite form to justify deferring the construction of a new bridge over the river, which new bridge was or would have been necessitated to conform to the Roosevelt road improvement.

If the river is straightened as contemplated, the B. & O. tracks will be east of the river instead of west, as at present, and a new and permanent viaduct over that company's tracks will, of course, be required. It was in the light of this contingency, as we understand it, that the old bridge is being utilized and the B. & O. temporarily absolved from its obligation to construct a 118-foot permanent viaduct over its tracks as at present located. In lieu of such construction the present temporary viaduct has been built by the City over the B. & O., and the controversy now arises over the liability for the cost of relocating the street car tracks. The B. & O. Railroad Company does not participate in the use of the Union Station, and is bound by the Union Station Ordinance and supplemental agreements only to the extent therein specifically defined.

We do not think that Section 10 of the Union Station Ordinance of March 23, 1914, which section is quoted in your letter, is pertinent to the present inquiry. That section confers certain rights and imposes liabilities in general terms that are usual and customary in such cases, and would not apply to the B. & O. viaduct in any case because the B. & O. Company was not a party to that ordinance agreement and is not one of the constituents of the Union Station Company, and the present inquiry does not involve any controverted matters between the Chicago Surface Lines and the station company.

Had the plan contemplated in the supplemental ordinance or agreement of June 3, 1918, wherein it was agreed that the

station company should build a 118-foot viaduct over the B. & O. tracks and the latter company should pay the station company the cost thereof and the cost of relocating sewers and public utility equipment, been carried out as originally intended, there would seem to be no question but that the B. & O. would be liable to the surface lines for the disputed amount, although we have no desire to be understood as attempting to adjudicate the rights of one company as against the other. Inasmuch as the City, for purposes of its own, temporarily absolved the B. & O. road and the Union Station Company from the obligation jointly assumed in the supplemental agreement of June 3, 1918, and thus rendered that agreement inoperative for the time being at least, it would likewise seem that that agreement is not pertinent to the present inquiry.

However, we know of no possible theory upon which a recovery for the amount claimed by the Chicago Surface Lines could be had against the City. The LaSalle & Chicago R. R. Co. Ordinance of 1872, to which the B. & O. succeeded, undeniably require the latter company to maintain a viaduct at the place in question, and had it not been for the intervention of the river straightening project, the permanent viaduct contemplated by the supplemental agreement of June 3, 1918, would undoubtedly have been built by now and the surface lines reimbursed as there provided. If it be contended that in constructing the temporary viaduct the City was merely acting for the B. & O. and vicariously discharged an obligation theretofore imposed upon the company, and that such viaduct was, under the terms of the LaSalle & Chicago Ordinance of 1872, constructed as a matter of law and fact for the use and benefit of the B. & O. Company, then it is clear that the City would not be liable to reimburse the street car company for the amount claimed. The precise point, so far as we know, has not been decided by our Supreme Court. A close analogy, however, is the case of *Shrader v. C. C. C. & St. L. Ry. Co.*, 242 Ill. 227. In that case a grant to a railway company authorizing it to lay its tracks in a city street provided that the crossing should be effected by means of an

overhead viaduct. The viaduct was accordingly built, and its construction occasioned damage of various sorts to the property of an abutter, who accordingly brought an action against the carrier for the damages sustained and recovered a judgment. In the Supreme Court it was contended by the railroad company that inasmuch as the construction of the viaduct was authorized by municipal ordinance, the municipality alone should be held liable for whatever damage accrued. The court overruled this contention and said (p. 230) :

“While the grade was established by the village and it was liable for any damage caused to abutting property by the change, it was, the crossing of the street by the railroad which made the change of grade necessary to the accommodation and protection of persons using the street. It was in order that the company might have the privilege of crossing the street that it was required to erect the approaches so as to restore the street to a condition which would be safe for public travel and would not unnecessarily impair its usefulness. While the approaches to the viaduct were no part of the railroad, their construction by the company was made necessary by the construction of the railroad under the ordinance.”

The temporary viaduct in question is either a public improvement, or one in the nature of a private improvement, that is to say, for the use and benefit of the railroad. While we do not presume to adjudicate the rights and liabilities of the B. & O. Company and the Chicago Surface Lines, it is clear that if the viaduct be regarded in law as a private construction for the use and benefit of the railroad company although in a city street, the rule announced in the *Shrader* case plainly and specifically relieves the City of any liability for the damage claimed. If on the contrary the viaduct be held and considered as an out and out public improvement without reference to whatever direct or incidental benefit may accrue to the carrier, it is equally clear that the City cannot be held to respond in damages for the disputed amount. This rule is plainly and clearly stated in a long line of familiar decisions where it is uniformly held that a public utility company takes its rights in City streets expressly subject to the

power of the City to make such improvements as the public convenience and necessity may require, and that the expense of relocating its equipment to conform to any such improvement must be borne by the utility company affected. (See *New Orleans Gas Light Company v. Drainage Commission*, 197 U. S. 453.)

Accordingly, whatever may be the rights of the Chicago Surface Lines and the Baltimore & Ohio Company as against each other, and as to which we express no opinion, we are clear that the City cannot be held liable to reimburse the surface lines for the cost of relocating their tracks on the temporary viaduct in question.

Yours very truly,

JAMES J. COUGHLIN,
WILLIAM J. TUOHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Protection of Public at Grade Crossings.

October 30, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

In response to your inquiry of the 26th inst. requesting this office for advice and information as to what steps may be taken to require the Nickel Plate road, or other proper parties, to protect the public against the common perils of a grade crossing at the crossing of Torrence avenue by the Nickel Plate road south of 130th street, we submit the following:

As we understand it, the county has recently laid a macadam roadway in Torrence avenue between 130th street and 138th street that connects with a paved street on the north and with a concrete highway on the south, and that the roadway is expected to be heavily traveled; that at a point about 300 feet south of 130th street the roadway is crossed by the Kensington & Eastern Railroad and the Nickel Plate road, whose rights of way adjoin; that the K. & E. tracks are elevated, but that the Nickel Plate tracks cross the road at grade and that the available space for roadway use is but twenty-four feet in width.

We also note that the County Superintendent of Highways has requested the Nickel Plate to protect its crossing in some manner, but that the Nickel Plate, relying on a stipulation filed in the case of *City v. Kensington & Eastern R. R. Co. et al.*, County Ct. No. 41463, has declined to so protect the crossing. That action was brought to open Torrence avenue across the right-of-way of the railroad. The stipulation recites that in consideration of the Nickel Plate road's agreement not to contest the suit the City agrees to relieve the railroad company from any and all liability for a period of ten years from the date of the order "attendant upon and in connection with construction and maintenance of gates or other protection or separation of grades at said intersection of said street and railroad tracks."

We do not construe the stipulation as an attempted undertaking by the City to indemnify the railroad company for any loss or damage it might sustain as a result of the absence of proper and sufficient crossing protection at the place indicated, because such an undertaking would hardly be legally adequate, if at all, in the form in which it is set up. It occurs to us that what was intended was that the company would be exempted from the operation of Sections 3403 and 3406 of the Code of 1922, which provide that railroads shall maintain flagmen, gates and signals at such grade crossings as the Council may designate. It does not appear that the Council has ever ordered such protection as is there provided for.

It is, however, unnecessary to consider whether the Council has or has not, or whether the stipulation was proper, valid and authorized at the time it was entered into.

The Supreme Court of this state in the very recent case of *Village of Atwood v. C. I. & W. R. R. Co.*, 316 Ill. 425 (Op. filed April 24, 1925), held that by Sections 57 and 58 of the Public Utilities Act, authorizing the Illinois Commerce Commission to regulate grade crossings and make provision for the safety of the public in regard thereto, the legislature has taken from cities and villages the power conferred by Paragraph 27 of Section 1 of Article V of the Cities and Villages Act to require railroad companies to keep flagmen at grade crossings, as the two statutory provisions are irreconcilable. This rule has been announced since the filing of the stipulation in the condemnation suit, and however impressive the good faith and intentions of the parties may have been at the time, the plain effect of the *Atwood* decision is that sole jurisdiction of such matters is in the Commerce Commission. And as was said in *O'Connell v. City of Chicago*, 278 Ill. 591, the commission is not bound by the contracts or agreements between municipalities and utility companies concerning matters over which the commission has such exclusive jurisdiction.

The stipulation cannot, therefore, be regarded of any force or effect as attempting to absolve the railroad company from properly protecting the crossing. Accordingly, we know of no reason why the City, county or any interested party may not properly petition the commission to order the carrier to provide such protection as the facts and circumstances may require.

Yours very truly,

JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Gongs on Vehicles of Telegraph Company When Responding to Burglar Alarms.

November 2, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your letter of recent date in which you inquire of this department whether or not the Illinois District Telegraph Company may attach gongs on their vehicles to be used for the investigation of burglar alarms, and when engaged in the apprehension of burglars as a result of such alarms.

Section 3876 of The Chicago Municipal Code of 1922, which we quote below, expressly prohibits the use of gongs on any vehicle except such as are owned by the City of Chicago.

“3876. OPERATION OF VEHICLES EQUIPPED WITH SIREN OR GONGS PROHIBITED.) It shall be unlawful for any person, firm or corporation to use or to cause or permit any of his, their or its agents or employes to use or operate **any motor vehicle, wagon or other vehicle** upon the streets or other public places of the city when such motor vehicle, wagon or other vehicle is equipped with a siren or a gong exceeding six inches in diameter; provided, however, that this section shall not apply to motor vehicles, wagons or other vehicles owned by the city of Chicago and operated by it in the service of the police, fire or health departments.”

If the request is a meritorious one which will aid your department in the apprehension of criminals, and the use of gongs upon their vehicles will be helpful to said company, you are, of course, at liberty to recommend to the City Council an amendment to the section which will permit companies of this character to employ the use of gongs when an emerg-

ency exists, but until such amendment is recommended by you and approved by the City Council, this company cannot be granted this permission.

We return herewith original letter from the Illinois District Telegraph Company for your files.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Mayor's Power to Veto Amendment to Zoning Ordinance.

November 3, 1925.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

This will acknowledge receipt of your letter of November 2d relative to your authority to veto an ordinance embodying an amendment to the Zoning Ordinance.

Alderman Pontow has reintroduced and the council has repassed an ordinance which changes the classification of a block in his ward from a first volume district to a second volume district. He has the consent of 98 per cent of the property owners in the area affected. The question is, have you the right to veto this amending ordinance?

The zoning enabling statute attempts in no way to curtail or limit the veto power of the Mayor. It does contain a provision that,

“In case of written protest against any proposed amendment, signed and acknowledged by the owners of twenty per cent of the frontage proposed to be altered, or by the owners of twenty per cent of the frontage immediately adjoining or across an alley therefrom, or by the owners of twenty per cent of the frontage directly opposite the frontage proposed to be altered as to such regulations or district, filed with the clerk of the city, village or incorporated town, such amendment shall not be passed except by the favorable vote of two-thirds of all of the members of the city council.”

But this is a limitation only upon the power of the City Council requiring of that body a two-thirds vote to pass an amendment to the Zoning Ordinance where there are filed with the city clerk certain objections to such amendment.

The Mayor has the same power to veto an amendment to the Zoning Ordinance, regardless of the favorable or unfavorable attitude of the property owners affected by such amending ordinance, as he has to veto any other ordinance.

There is nothing in the zoning statute or any other statute, as far as we are aware, that could even be remotely construed as limiting or curtailing his power to veto an amendment to the Zoning Ordinance.

In view of the above, we are of the opinion that the Mayor has the power to veto the ordinance under consideration.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Laying Off Civil Service Employees for Lack of Funds.

November 3, 1925.

HON. LEO J. WINIECKI, Commissioner of Public Service:

Dear Sir:

Replying to your request of this date for an opinion as to the authority of department heads to lay off civil service employes because of lack of funds, we would respectfully refer you to an opinion covering this subject-matter written by Leon Hornstein, and published in the volume of Opinions of the Corporation Counsel and Assistants from January, 1913, to October, 1914. In this opinion Mr. Hornstein calls attention to Section 12 of the Civil Service Act, which reads:

“NOTHING IN THIS ACT SHALL LIMIT THE POWER OF ANY OFFICER TO SUSPEND A SUBORDINATE FOR A REASONABLE PERIOD NOT EXCEEDING THIRTY DAYS.

“Under this provision of the Act the right of the heads of departments to dismiss or lay off employes for thirty days without pay cannot be questioned, no matter what the cause was for such action. In the present instance the lay-off or suspension was caused by a lack of funds, and in that respect the right to take such action would have existed without resorting to the clause quoted above.”

On page 379 of said volume of opinions, Mr. Hornstein says:

“The form of the notice to the employe is also an immaterial matter, and it makes no difference whether he was relieved from duty, suspended or laid off. Where an employe has no right to continuous employment because of lack of funds and is laid off temporarily or put on short time to keep the expenses within the appropriation, or because there is no work for him to do, he cannot recover for such time.”

The subject-matter of the above opinion was carried to the Supreme Court in the case of *Thomas v. City of Chicago*, Illinois Reports, Volume 273, page 479, and the court held in that case:

“Under Section 12 of the City Civil Service Act a head of a department in a city has power, acting in good faith, to lay off his subordinates for a period not exceeding thirty days because of lack of work, lack of funds or other good cause, and this power is not restricted to the seniority method prescribed by Section 7 of Rule 8 of the Chicago Civil Service Commission,” citing *Fitzsimmons v. O’Neill*, 214 Ill. 494.

The court further said:

“The language of Section 12 is explicit and unambiguous. It provides clearly that nothing in this Act shall limit the power of any officer to suspend a subordinate for a reasonable period not exceeding thirty days.”

Section 7 of Rule 8 adopted by the City Civil Service Commission provides that:

“Whenever it becomes necessary in any Bureau through lack of work or lack of funds or for other cause to reduce the force in any employment, the person working in such Bureau who was last certified for such employment shall be the first laid off. Seniority of certification shall control in lay-off cases of employes transferred from one Bureau to another or reinstated in the service.”

In reference to that section, in the *Thomas* case, the Supreme Court says:

“Without deciding whether the Civil Service Commission had the power to adopt the rule in question and give it the force of law, we think it is clear that the rule does not apply to a suspension or lay-off not exceeding thirty days, when such suspension or lay-off is made in good faith and because of lack of funds as was done in this case.”

The limitation of the power of the department head in lay-offs or suspensions to a period not exceeding thirty days is absolute under the rule laid down in the case of *The People*

ex rel. Roderick v. The City of Chicago, 283 Ill. 462, where the Supreme Court held:

“The Civil Service rules do not permit the holding of positions open for officers or employes for a longer period than thirty days, or, in case of injury in the service, sickness or other disability, ninety days, and the statute requires vacancies to be filled.”

We are of the opinion, therefore, that a department head has the power to lay off Civil Service employes when such lay-off is made in good faith and because of lack of funds and for a period of not exceeding thirty days.

In the case of temporary employes the rule is different. Temporary employes may be laid off at any time and for any period, when in the judgment of the department head proper administration of his department warrants such lay-off.

Respectfully submitted,

EDMOND L. MULCAHY,
Second Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Substitution of Electric Lights for Lamps on Oakley Boulevard.

November 13, 1925.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

We have your letter of the 4th instant, in which you state that you are at the present time lighting Oakley boulevard between North avenue and Kinzie street with 36 gas and five gasoline lamps which the City rents from a private con-

tractor and pays for out of City funds. You further state in your letter that the gas and gasoline lamps in question cost more money to operate than would electrically operated lamps, and that they furnish a very unsatisfactory and insufficient illumination, and have been the subject of numerous complaints.

The street in question is one that was turned over to the West Chicago Park Commissioners as a part of the West Park system. The portion of the street that you speak of is only partly lighted by the park commissioners, and the City lights are interspersed among the park lights. It is generally understood that these City lights should either be replaced or taken out altogether.

In your letter you state that the department is very desirous of taking out the lamps which it is maintaining and paying for on this boulevard, and you ask for an opinion as to the legality of doing so, taking into consideration the injury to the public that would result by reason of such action.

So far as injury to the public is concerned, that is not a question of law. That is more a question of policy to be determined by you. If the removal of the lamps would result in leaving the street so dark that there would be danger or injury to the public, there might be justification in continuing to light the street even though that duty is not one that devolves primarily upon the City government.

On the question of the *right* of the City to remove lamps from a street which is under the jurisdiction of another municipal corporation, there is no doubt whatever that the City can do so. Proper precaution should be taken, of course, to avoid any interference with the regulations of the park board; that is to say, before proceeding with the work of removing the lamps, application should be made to the board, and notice given, so that permits may be issued and precautions may be taken to avoid accident while the work is in progress. It is no more proper for the City authorities to undertake construction in a boulevard under the jurisdiction of the park board than it would be for any other

municipality to undertake work in the streets of the City without proper permit being issued.

Aside from the obtaining of permission and the exercise of ordinary caution as indicated above, there is no obligation on the part of the City either to the park board or to the public, and certainly no obligation to maintain lights at the City's expense.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Removal of Recently Erected Barriers in an Alley Midway Between Giles and Prairie Avenues.

November 16, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your communication of November 5, 1925, requesting to know what action is proper on the part of your department to cause the removal of the barriers, recently erected, now preventing egress and ingress from 33d street to "an alley" midway between Giles and Prairie avenues, running south thereof to 35th street.

To this correspondence was attached a letter from Hon. Louis B. Anderson, Alderman of the 2d Ward, as well as several letters and petitions by owners of property next adjoining said alley in said block. From an examination of our maps in the Map Department it is evident that parts of this alley were dedicated as and for a public alley before the Chicago Fire. We have examined the premises and find

that 33d street, between Prairie and Giles avenues, had been paved many years ago and the alley-return for said alley was paved in connection with said pavement up to the south line of 33d street.

It would seem from this that the City of Chicago and the general public have been in the actual, physical, open, constant, continuous and uninterrupted use and enjoyment of this strip of land as and for an alley, using and claiming the same in good faith, for a period extending over thirty years. This would create an easement to use said strip of land as and for an alley by the public, and should not in any manner be abridged.

The chapter on Public Works, Article I, Department of Public Works, Section 3215 of the Municipal Code, 1922, reads as follows:

3215. POWER TO REMOVE OBSTRUCTIONS.) The commissioner of public works may direct the removal of any article or thing whatsoever, which may encumber or obstruct any street, avenue or alley in the city.

In the chapter on Streets, Article II, Limitations on Use of Streets, we find the following sections:

3709. ERECTION OF BUILDING OR OTHER STRUCTURE IN STREET FORBIDDEN.) No person, firm or corporation shall erect or place any building or other structure, in whole or in part, upon any street, alley, sidewalk or other public ground within the city, and every person, firm or corporation that violates or fails to comply with any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars for each offense.

3710. OBSTRUCTION UPON STREETS—NEW STREET.) The owner of any building, structure, fence, porch, steps, gallery or other obstruction now standing or which may hereafter be erected or placed upon any street, alley, sidewalk or public ground within this city, or which may be left standing upon any new street that has been opened, or may hereafter be opened, shall remove the same within such reasonable time, not exceeding thirty

days, as may be fixed by the commissioner of public works in a written notice to be served as hereinafter provided for, but the time fixed therein shall not be less than five days after such service. Such written notice may be served upon the owner or upon the person or corporation in possession or occupancy of the premises, or by posting the written notice upon such building, structure, fence, porch, steps, gallery or other obstruction.

Any person or corporation violating any of the provisions of this section shall be fined not less than twenty-five dollars nor more than two hundred dollars, and shall be fined a further sum of ten dollars for each and every day such building, structure, fence, porch, steps, gallery or other obstruction shall remain after the expiration of the time fixed for the removal of same in the written notice given as in this section provided.

3711. REFUSAL TO REMOVE—NUISANCE.) Whenever the owner of any building, structure, fence, porch, steps, gallery or other obstruction upon any street, alley, sidewalk or public ground in this city, shall refuse or neglect to remove the same, after notice served as prescribed in the preceding section, the same shall be deemed a nuisance, and the commissioner of public works shall cause the same to be removed or taken down, and the expense of such removal or taking down shall be recoverable from the owner in an action of assumpsit. Any person who shall forcibly and unlawfully resist the execution of any order of the commissioner of public works in the premises shall be deemed guilty of disorderly conduct and shall be subject to a penalty of not less than five dollars nor more than two hundred dollars.

From our personal examination of the barriers and alley in question we think that these particular barriers or obstructions are of such nature that in this particular case they come under the above quoted Section 3215, and consequently, we are of the opinion that the Commissioner of Public Works is authorized to remove these barriers without further notice. After these barriers have been removed, it may be advisable to notify the purported owner, J. M. Loughlin, not to erect any barriers or obstructions in this alley in the future.

We are returning herewith the letters from Alderman Anderson and Mr. Baker and also the several petitions.

Very truly yours,

FRANK T. HUENING,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Awarding of Contracts for Electrical Repairs.

November 16, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

My Dear Colonel:

I beg to acknowledge receipt of your letter of the 12th instant, transmitting communication from the Association of Electric Motor Dealers & Repair Shops relative to the manner of awarding contracts for electrical repairs for the City.

After talking this matter over with you, at length, I took the matter up with Mr. Frank F. Roeder, of the Department of Supplies and I think we all agree that the present practice clearly invited fraud upon the City. I understand that all of the concerns bidding on this work employ union labor and pay the union scale. Obviously these shops cannot honestly make a bid to do this work for the City at less than the union scale. The evident intent of such bidder is to make up in the billing of time consumed and material used for the ostensibly low hourly rate.

In order to obtain competition among such bidders and discourage the practice in question, I suggest that in future specifications the bidders be directed to bid for said work

on the basis of the union scale plus shop overhead, material and cartage. This will permit of legitimate competition on the last three items. In order that you may have a further check upon the actual time employed in such repair work, I suggest that the specifications contain a requirement that the successful bidder shall submit with his bill an affidavit signed by the general manager and shop foreman giving the actual number of hours consumed in the work billed, together with the names and addresses of those employed on such work. This would furnish a means of checking the bill and would establish the basis of a criminal action against any concern which would attempt to defraud the City through padded bills.

Incidentally, I might add that if the amount of electrical repair work in the Department of Public Works for a given period of six months or a year exceeds \$500, there is no reason why such contract should not be let by competitive bidding after advertisement in accordance with the law and following the practice with reference to the purchase of other commodities for your department.

Very truly yours,

FRANCIS X. BUSCH,
Corporation Counsel.

**Proposed Location of Refuse Destructor at Stone
Quarry Now Used for a Dump at Grand Avenue
and Ohio Street.**

November 17, 1925.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of November 5th. The Department of Public Works of the City

of Chicago has made application to you for a permit for a refuse destructor to be constructed at the old stone quarry at Grand avenue and Ohio street. You wish to be advised whether, as a matter of law, the issuance of a permit for the refuse destructor at that location would be contrary to the provisions of the Chicago Zoning Ordinance.

Accompanying your letter is a communication from Hon. A. A. Sprague, Commissioner of Public Works of the City of Chicago, making application for the permit and describing in detail the construction and operation of the refuse destructor. Commissioner Sprague states that the refuse destructor will be a modern, high temperature, preheated air, forced draft furnace used to reduce refuse to ashes and that the resulting ash will amount to only about 10 per cent of the original refuse; that the refuse destructor in its operation will be dustless, smokeless, odorless and noiseless; that it should be classified as an M1 use; that the buildings of the refuse destructor plant will be of the best type of architecture and will add to the general appearance of the neighborhood; that a study of the proposed plant will show that it would not be objectionable in any neighborhood; that the City has been using the premises upon which the refuse destructor is to be constructed as a refuse dump since 1917; that the City is now dumping refuse and ashes into the old quarry there; that this dumping, as it is done at present, makes dust and creates a nuisance; that it is to eliminate this nuisance that the refuse destructor is to be constructed; and that the operation of the refuse destructor will be a great improvement over the present method of disposal, and for that reason should be welcomed.

According to Commissioner Sprague, the particular district in which the refuse destructor is to be constructed has always been and is now being used by enterprises which are generally regarded as objectionable, such as stone crushing plants, cement plants, boiler shops and railroad yards, and that all make dust, smoke and noise.

Commissioner Sprague also states that refuse destructors, similar to the one proposed, are located in New York,

Charleston, Brooklyn, Evanston and Toronto adjacent to residence property, without being objectionable, and that in Toronto two of the largest plants in the world are located close to a high class residence section and to a hospital, and have not been found objectionable in any way.

“The proposed plant,” he adds, “is an improvement over any one now in existence as regards dustless, odorless, sanitary operation.”

This department is also in receipt of a letter from Hon. Joseph Higgins Smith, Alderman of the 32d Ward, vigorously protesting against the issuance of a permit for the refuse destructor. The premises upon which it is proposed to erect the refuse destructor are in the 32d Ward, and Alderman Smith is a resident of an apartment district which is within 900 feet of the proposed plant.

The Alderman contends that the refuse destructor is an incineration plant; that the purpose of the incineration plant is to burn and destroy rubbish, that it should be classified as an M3 use.

The Alderman further writes as follows:

“The Zoning Ordinance classified an incineration plant as an M3 use and strictly provides that any premises or building for such a use, *i. e.*, as an incineration plant, must be at least 2000 feet from any residential or apartment district and 500 feet from any commercial district. The incineration plant proposed to be established in this instance is within 900 feet of a residential district.

“It is my opinion that since the City Council specifically classified an incineration plant as an M3 use that this classification cannot be erased, removed or changed by reason of an incineration plant presumably having certain features such as dust collecting appliances and fume destroyers.

“The City Council in enumerating incineration plants certainly should be presumed to have had in mind a modern incineration plant such as that for which a permit is requested from you and has been described to you as a refuse destructor.”

The Alderman also states that about a year ago he inspected a plant at Charleston which is of the same type as the proposed refuse destructor and observed its operation for three days; that he knows of his own knowledge that it is a nuisance and would be objectionable if located within a close distance of a residence district.

This department has nothing to do with the advisability or inadvisability of the installation of the proposed refuse destructor at the place designated. The question presented to this department is a purely legal one and its answer depends entirely upon the legal interpretation to be given to certain provisions of the Zoning Ordinance.

The Zoning Ordinance, for the purpose of classifying, regulating and restricting the location of trades and industries and the location of buildings designed for specified industrial business, residential and other uses, divides the City of Chicago into four classes of districts: (1) Residence districts, (2) Apartment districts, (3) Commercial districts and (4) Manufacturing districts. By an elaborate system of regulations and prohibitions the Zoning Ordinance undertakes to impose restrictions upon the use of property, the restrictions depending upon the district in which the property is situated and the nature of the use that is to be made of the property.

The tract of land upon which the refuse destructor is to be erected is shown by the Zoning Ordinance to be in a manufacturing district. Manufacturing districts by the terms of the Zoning Ordinance are the least restricted of all the use districts, and any use of property which is lawful within the City is permitted in manufacturing districts subject to certain limitations.

There would be no doubt about the right of the Department of Public Works to a permit for the erection of the refuse destructor, it being in a manufacturing district, except for the fact that the particular plot of ground upon which it is proposed to erect the refuse destructor is within 900 feet of an apartment district. Certain objectionable uses,

even though permitted in manufacturing districts, may not be placed within 2000 feet of an apartment district. If the refuse destructor is to be classified as one of such objectionable uses a permit for its erection may not be issued because it is to be located within 900 feet of an apartment district. Such objectionable uses are classified by the Zoning Ordinance as M3 uses.

All M uses, which are the uses for which manufacturing districts are specifically set apart, are divided by the Zoning Ordinance into three different classes known as M1 uses, M2 uses and M3 uses. M3 uses may not be established nearer to a commercial district than 500 feet nor nearer to a residence or apartment district than 2000 feet. M2 uses may not be established nearer to a commercial district than 125 feet. There are no specific limitations in the Zoning Ordinance as to the distance which an M1 use must be from a residence, apartment or commercial district.

Though a great many specific uses of property are enumerated as being within the classification of an M1 use, M2 use and M3 use respectively, the use of property for a refuse destructor is not so enumerated, at least not under that name.

Let us therefore briefly consider generally the provisions of the Zoning Ordinance covering the different M uses, to ascertain, if we can, the general principles which are made the basis of the classification as M1, M2 and M3 uses, in the endeavor to place in its proper classification the proposed refuse destructor.

Section 11 of the Zoning Ordinance reads as follows:

Section 11. MANUFACTURING DISTRICTS. (a) In a manufacturing district no building or premises shall be used nor shall a building be erected, altered, or enlarged which is arranged, intended, or designed to be devoted to a use prohibited in the City of Chicago by any other ordinance. In a manufacturing district no building or premises shall be used nor shall any building be erected, altered, or enlarged which is arranged, intended, or designed to be used except for R, A, C, or M uses or special uses exclusively as hereinafter provided.

“(b) For the purpose of this ordinance, an M use is hereby defined as any use for an occupation, business or activity other than an R, A, or C use, that may lawfully be carried on within the city, and shall include every lawful use except an R, A, or C, or special use. All M uses are further defined and classified as M1, M2 or M3 uses as follows:

“M1 Use—An M1 use shall include such storage, manufacturing, or other uses of property coming within the definition of an M use as do not injuriously affect the occupants of adjacent uses and are so operated that they do not emit dust, gas, smoke, noise, fumes, odors, or vibrations of a disagreeable or annoying nature.

* * * * *

“An M1 use, provided such use does not customarily emit dust, gas, smoke, noise, fumes, odors, or vibrations which may be offensive or noxious to the adjacent R or A or C uses and does not injure the operation of adjacent C or M uses, shall include also every such use as * * *”

A great many uses are then specifically enumerated as being within the classification of an M1 use, and at the end of the enumeration is the following:

“Or any use not otherwise classified which is not contrary to the general definition of an M1 use and not contrary to the classification of such uses herein made.”

A refuse destructor, it should be remembered, is not “otherwise classified.” Likewise it “is not contrary to the general definition of an M1 use and not contrary to the classification of such uses herein made.”

An M2 use is defined as follows:

“M2 Use—An M2 use shall include the uses set forth hereunder, provided such use does not customarily emit dust which is not controlled by competent dust collecting appliances, or such use is one which from the nature of the materials handled or processes customarily employed emits dust, gas, smoke, noise, fumes, or odors to such an extent as to affect the health, safety, comfort, morals or welfare of occupants of R or A or C uses located not farther than 400 feet from the M2 use, and which use does not customarily emit corrosive or tarnish-

ing gases or fumes which injure C or M uses distant 100 feet or more from the M2 use, or which does not create vibrations to an extent that would damage buildings or affect the position or alignment of machinery erected with usual permanency on premises distant 100 feet or more from the M2 use; in which classification, subject to the conditions named, is every such use as * * *"

A great many uses are then specifically enumerated as being within the classification of an M2 use, and at the end of the enumeration is the following:

"Or any use not otherwise classified or which is not contrary to the general character of M2 uses as indicated by the classification herein contained and the conditions imposed."

The following is an M3 use:

"M3 Use—An M3 use shall include all M uses which are excluded from the M1 and M2 classification, including every such use as * * *"

Certain uses are then particularly enumerated and at the end of the enumeration is the following:

"Or any other use that is lawful within the city, which would be harmful by reason of dust, gas, smoke, noise, fumes, odors, vibrations, soot, sudden fire or explosion or any other causes, to a use otherwise classified at a distance of 2,000 feet or more from the M3 use; provided the uses set forth hereunder are not contrary to the provisions of any other ordinance of the City of Chicago."

From a careful consideration of the above provisions we think that it will be readily seen that the ultimate test of an M1 use is whether it is such a use as will not in its operation injuriously affect the occupants of adjacent uses and is so operated that it does not emit dust, gas, smoke, noise, fumes, odors or vibrations of a disagreeable or annoying nature. That such a test is to be applied is further shown by the fact that even though a use may be specifically enumerated by the Zoning Ordinance as being an M1 use, yet unless in its operation it falls within the general requirements of an M1

use, it cannot be placed in that classification. In other words, it is not the particular name by which a use is called that necessarily determines its classification as an M1 use but it is rather the absence of the emission of dust, odors, etc., in its operation that controls. "Shale products manufacturing" is enumerated as an M1 use, yet if in its operation it emits dust, gas, smoke, noise, fumes, or odors or vibrations of a disagreeable nature, it could not retain the classification of an M1 use, but would be an M2 or M3 use, depending upon the degree of obnoxiousness with which it was operated.

By its general definition of an M2 use the Zoning Ordinance recognizes that it is a use which is more obnoxious than an M1 use in that it is a use which from the nature of the materials handled or processes employed emits dust, gas, smoke, fumes, or odors to a certain extent but does not customarily emit corrosive or tarnishing gases or fumes which injure C or M uses 100 feet or more away; or does not create vibrations to an extent that would damage buildings or affect machinery 100 feet or more distant. Though a use may be specifically enumerated as an M2 use, yet to retain that classification it must in its operation fall within the general definition of an M2 use.

An M3 use, on the other hand, is recognized as the most objectionable and obnoxious use that may be operated. It is any use of property that is not made unlawful by other city ordinances, and includes uses that would be harmful by reason of dust, gas, smoke, noise, fumes, odors, vibrations, soot, sudden fire or explosion or any other cause to a use otherwise classified at a distance even of 2000 feet or more.

The above provisions, we think, clearly show that it was the intent of the City Council to classify those uses which, because of their operation, are most obnoxious and objectionable to adjacent property as M3 uses, less obnoxious uses as M2 uses, and the least obnoxious uses as M1 uses, the ultimate test evidently being the presence or absence of the emission of dust, gas, smoke, noise, fumes, odors, or vibrations by the operation of the use and the extent thereof.

As we have pointed out above, unless the refuse destructor is an M3 use, you would have no alternative except to issue a permit for its erection. Our next consideration then is whether the refuse destructor is an M3 use.

The Zoning Ordinance defines an M3 use as follows:

“M3 Use—An M3 use shall include all M uses, which are excluded from the M1 and M2 classification; including every such use as * * *”

The ordinance then enumerates certain uses, and among them the following:

“Incineration, drying or reduction or storage of garbage, offal, refuse, dead animals or other refuse.”

Is the refuse destructor an M3 use because it is excluded from the classification of M1 and M2 uses; or is it an M3 use because there is included in the enumeration of M3 uses, “Incineration * * * of refuse * * *”

Is the proposed refuse destructor excluded from the M1 and M2 classification? Applying to the proposed refuse destructor the general principles which we have shown are made the basis of the classification of the different M uses, it is difficult for us to see how it could be so excluded from the classification of an M1 use.

The ultimate test of an M1 use is whether the use will in its operation injuriously affect the occupants of adjacent uses and is so operated that it does not emit dust, gas, smoke, noise, fumes, odors or vibrations of a disagreeable or annoying nature. That the proposed refuse destructor meets all the requirements of an M1 use is, we think, clearly shown by the following excerpt from the letter of Commissioner Sprague:

“Dust—All operations are confined within the building, and what little dust is made is confined and settled so that none escapes to the outer air. In the proposed destructor the resulting ash amounts to only about 10 per cent of the original refuse. This small amount of ash is drawn from the grates through an enclosed duct, wet down and settled by a water spray, then dropped

into an enclosed car. The small quantity of wet, dustless ashes is then dropped into the quarry. The whole process is enclosed and dustless. As an added factor of safety, the ash basement is ventilated by a system of fans which will collect any dust in the air and deposit it in a collector where it will be settled by a water spray. From the above it can be seen that no dust can escape from the proposed plant.

“GAS, SMOKE, FUMES—No gas, smoke or fumes escape from the furnace. Combustion takes place in the grate chamber, and, as the products of combustion pass from the grate chamber to the combustion chamber, they are mixed with enough pre-heated air to complete the combustion process, so that the final gas, which passes up the stack, is just a hazy vapor. The stack is 150 feet high, and the vapor is dissipated into the atmosphere at that great height. Also, in the combustion chamber, the velocity of the gases is low, so that all dust and cinders are deposited, and none passes up the stack.

“ODORS—It is well known that a temperature of 1250 F. will break down and consume all odors in a refuse destructor, and the temperature in the proposed furnace will range from 1500 to 2400F., so that all odors will be eliminated. Any odors which might occur in the receiving bins are drawn off by the forced draft fans, delivered to the furnace and burned. The entire plant will be absolutely odorless. Numerous plants in different parts of the country are free from complaint from this source.

“NOISE AND VIBRATION—The only machinery in the plant will be a few rotary fans, so that there will be no noise and no vibration.”

There can, we think, be little doubt that the proposed refuse destructor, meeting as it does the requirements of an M1 use, should be classified as an M1 use, and it being so classified it would be excluded from the M3 use classification, unless it should be included as an M3 use because under the definition of an M3 use there occur the words “including every such use as * * *

“Incineration, drying, or reduction or storage, of garbage, offal, refuse, dead animals or other refuse.”

Alderman Smith contends that the proposed refuse destructor should be classified as an M3 use regardless of its

method of operation, stating that "the Zoning Ordinance classified an incineration plant as an M3 use."

The Zoning Ordinance does not mention anywhere the phrase "Incineration Plant." It does, however, use the words "Incineration of * * * refuse" under the enumeration of M3 uses, as we have shown above.

We admit that the argument of Alderman Smith would be entitled to serious consideration, although we do not feel it would be conclusive, if the Zoning Ordinance did not also specifically enumerate under M1 uses, the following:

"Crematory except a crematory located in a cemetery."

A crematory is defined as "A furnace for cremating corpses or refuse. Also a building containing such a furnace." (15 Corpus Juris, 1453; Webster Int. D.; Century Dictionary; 73 N. J. Eq. 49; 148 Ga. 152; 15 A. L. R. 287, 199 U. S. 306; 28 App. D. C. 598; 210 Michigan 18.)

The word "cremating," according to Webster's Revised Unabridged Dictionary, means "reducing to ashes by the action of fire." A crematory then is "a furnace for reducing to ashes, by the action of fire, corpses or refuse; also a building containing such a furnace."

That the word "crematory" has been for a long time given the meaning by courts and legislative bodies of a building containing a furnace used for reducing refuse to ashes is clearly shown by a reading of the decisions in the cases we have above cited, in which many references are made and expressions used to show that a crematory is understood to be a place for the burning of refuse. Indeed, in the case of *Pantlind v. City of Grand Rapids* (210 Michigan 18), there was involved the validity of an ordinance of the City of Grand Rapids, and the title of the ordinance was

"An Ordinance Providing for the Regulation, Collection, Removal, and Cremation of Garbage, Offal, Dead Animals, and Other Refuse Matter, and for the Regulation of the *Crematory* in the City of Grand Rapids."

We refer to these cases simply to show that the word "crematory" has been commonly understood for many years by lexicographers, courts and legislative bodies as meaning, in addition to a place for burning human bodies, also a place for the cremating of refuse, and that the meaning which we accord it in this opinion is not a new or unusual or technical one.

We think further that the City Council by using the words "crematory except a crematory located in a cemetery" under the M1 use classification intended to provide that a crematory for human bodies located in a cemetery should not be included at all in the M1 use classification, but that all other crematories whether for human bodies or for refuse should be classified as M1 uses, provided, of course, that in their operation they conformed to the general definition of an M1 use.

Also we think that it must be presumed that the City Council in placing "incineration of refuse" under an M3 use intended it to cover all burning of refuse where the burning was accompanied by odors, smoke, etc., whether the burning was done in the open, done in the old-fashioned incinerator where the refuse simply cooked and boiled accompanied by odors, or done in any other manner that would place it in the M3 classification by reason of the deleterious effects of the operation upon adjacent uses.

Neither do we think that the enumeration of "incineration of refuse" under the M3 use classification, especially when we consider the general standard of that classification and the uses permitted thereunder, has any application to the proposed refuse destructor in the manner in which the same is to be operated.

We find in the Zoning Ordinance that "stone grinding or cutting" is classified both as an M1 or M2 use. In which of these classifications it should be properly placed, however, would depend altogether whether the use as operated is within the general definition of an M1 use as to smoke, noises, etc., or whether its operation would be accompanied

by the more objectionable features of noise, smoke, etc., which characterize M2 uses.

After careful consideration of the entire matter, we are of the opinion that the refuse destructor should be classified as an M1 use, and a permit therefor should not be withheld on the ground that its operation will be in violation of the provisions of the Zoning Ordinance.

If its operation should fail to conform to the high standard set forth by Commissioner Sprague in his letter, but instead should emit dust, gas, smoke, noise, fumes, odors, or vibrations of a disagreeable nature, a different question would be presented to you, but we have no right to assume in advance that such a situation will arise.

This opinion is based upon the statement of the Commissioner of Public Works that the proposed refuse destructor will not injuriously affect the occupants of adjoining uses and that it will be so operated that it does not emit dust, gas, smoke, noise, fumes, odors or vibrations of a disagreeable or annoying nature. The question here is whether it was within the intent of the City Council to classify a use such as the refuse destructor, to be operated in the manner above set forth, as an M3 use. We do not think it was.

The propriety of constructing the refuse destructor in the locality proposed we are not called upon to determine. It may be admitted that a refuse destructor is probably not a desirable adjunct to any neighborhood. On the other hand, the proper disposition of refuse is recognized as one of the necessary functions of municipal governments. How or in what manner that should be accomplished is a matter for the City Council and the Department of Public Works and not for this department.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Enforcement of Statute Requiring Bond or Insurance Policy for Taxicabs.

November 17, 1925.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

We have your letter of the 6th inst., in which you refer to the enforcement of a statute requiring owners of vehicles carrying passengers for hire to file a bond or a policy of insurance with the Secretary of State, and providing for punishment of violators thereof, in which letter you ask this office to advise you what action should be taken by your department with regard thereto.

Our Supreme Court, in the case of *Weksler v. Collins*, reported in volume 317 page 132, has held this law to be constitutional, and while an appeal has been taken to the United States Supreme Court, during the pendency of such appeal, the decisions thus far having upheld the validity of such statute, you are charged with the duty of its enforcement.

Section 3945 of Article III of Chapter LXXXV (Vehicles) of The Chicago Municipal Code of 1922 requires operators of public passenger vehicles to furnish satisfactory evidence to the public vehicle commission that *all* provisions of the Motor Vehicle Law of the State of Illinois relating to the qualifications for and operation of public vehicles have been complied with.

Under Section 42a of the Motor Vehicle Law a bond or insurance policy is required to be furnished to the Secretary of State by the owners of public passenger cabs. Due inquiry should be made by the Public Vehicle License Commission as to whether or not cab owners have conformed to the provisions of this section.

Section 3933 of said code provides for the suspension or revocation of licenses of operators who fail to comply with our laws, and if no effort is made to comply with the law, then it is incumbent upon the Public Vehicle License Commission to take such action and invoke such penalties as our code provides.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Retirement of Firemen Off Duty on Account of Disability.

November 19, 1925.

BOARD OF TRUSTEES, Firemen's Pension Fund.

Gentlemen:

Complying with your request for an opinion as to the retirement of firemen off duty on account of disability, the following is submitted:

Your secretary forwarded a communication addressed to him by Mr. Joseph F. Connery, Fire Commissioner, enclosing two letters to be presented to the Board of Trustees of the Firemen's Pension Fund at the next meeting of the board, one of which letters made reference to certain members of the Fire Department who have been off duty with full pay on account of sickness for a period of more than three months; also, a letter addressed to the Board of Trustees by Mr. Joseph F. Connery, Fire Commissioner, enclosing a copy of a letter directed to the Civil Service Commission concerning Lieutenant Joseph A. McCormick, and a copy of the said letter last referred to as so enclosed.

In the letter to your Honorable Body first above noted, the Fire Commissioner made reference to the question of his duty to submit to your Honorable Body the names of firemen who have been off duty with whole pay, on account of sickness, for a period of more than three months.

I.

Section 9 of the Firemen's Pension Act reads as follows:

"If any fireman of any such city while in active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service, said board shall order the retirement of such disabled fireman and he shall be paid a monthly pension equal to one-half the amount of salary attached to the rank which he may have held in such fire service at the date of his retirement: Provided, further, that the pensions so paid shall not exceed the sum of three thousand (\$3,000.00) dollars per annum, nor be in any case less than six hundred (\$600.00) dollars per annum. Provided, however, that no pension shall be allowed to any fireman who has been so physically or mentally disabled while on leave of absence without pay for more than thirty days during any year."

II.

There is nothing in the Firemen's Pension Act that requires your Honorable Body to wait for an application to be filed before taking action in the case of members of the Fire Department who may be so physically or mentally disabled as to render necessary their retirement from active service.

III.

The law specifically makes it the duty of your Honorable Body to place disabled firemen upon the pension roll and to grant them a monthly pension in accordance with the provisions of Section 9, above quoted.

I V .

I am of the opinion that whenever the Fire Commissioner or the Fire Marshal submits to your Honorable Body a report setting forth that any fireman named in such report is so physically or mentally disabled as to render necessary his retirement from active service, and your Honorable Body has satisfactory medical and other evidence as to such disability, it becomes your duty under the law to retire such fireman, as provided in Section 9, above quoted, regardless of whether or not such fireman has filed or failed to file an application for retirement.

I am returning herewith the papers sent me and hereinabove referred to.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim of Second Assistant Fire Marshal for Back
Salary Upon Reinstatement.**

November 20, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir :

In compliance with your request of the 9th instant we are submitting our opinion as to the City's liability in the matter of the claim of John C. McDonnell for back salary from September 23, 1922, to December 16, 1922, as former Second Assistant Fire Marshal and Chief of the Bureau of Fire Prevention.

The claimant is the relator or petitioner in the case of *The People ex rel. John C. McDonnell v. Thompson et al.*, reported in 316 Ill., page 11. In that case the Supreme Court held that the claimant was entitled to the salary from December 18, 1922, the date of the judgment of the Circuit Court in the certiorari proceedings. The instant claim is for the salary prior to the aforesaid judgment and from the time of claimant's suspension by the Civil Service Commission, September 23, 1922. The right to the salary now claimed was not adjudicated in that case, and that decision lends no support to this claim. This claim presents quite a different legal proposition.

It is important to note that the Supreme Court awarded the claimant only that salary which accrued after the Circuit Court's judgment in the certiorari proceeding, and not that salary now claimed which accrued prior to such judgment, although the court states in its decision that

"The defendants by their answer admitted all the essential averments of the petition, including the averments that the relator had been wrongfully removed from his office and that the circuit court had judicially determined that fact by declaring in the judgment in the certiorari proceedings that all of the proceedings before the civil service commission were void and of no effect. A judgment awarding the writ of mandamus to compel re-instatement in office may include a command to pay salary. (*People v. Coffin*, 279 Ill. 401; 18 R. C. L. 260; *State v. Rundberg* (Mo.), 226 S. W. 986.) The rule in this State is, that the payment in good faith of the salary of an officer to a *de facto* officer constitutes a bar to an action by the *de jure* officer for the salary paid to the *de facto* officer. (*People v. Schmidt*, 281 Ill. 211.) The well defined exception to the above rule is that where the relator is illegally removed from his office and the salary has been paid to another person illegally appointed in his stead, a writ of mandamus will be awarded requiring the re-instatement of the relator in office and the payment of his salary during his illegal removal. (*People v. Brady*, 262 Ill. 578; *People v. Stevenson*, 270 *id.* 569; *People v. Coffin*, *supra*.) The relator in this case was clearly entitled to be paid his

salary from December 18, 1922; the date of the judgment of the circuit court in the certiorari proceedings, and is entitled to the writ to compel the payment of the same."

A judgment in certiorari which quashes the record of the Civil Service Commission is self-executing and operates of its own force to reinstate the civil service employe to his former status, but does not determine such employe's right to salary for the period of his suspension under the Civil Service Commission's order. Full faith and credit may be given such order so long as it is not quashed and set aside by the courts. The public service and its regular administration are so far paramount to the private rights, even of a civil service employe, that upon such employe's discharge by the Civil Service Commission another may lawfully be appointed in his stead. Indeed, the appointment to fill the vacancy thus created is made mandatory by the provisions of the Civil Service Act.

People ex rel. Roderick v. City of Chicago, 283 Ill. 462.

People ex rel. v. Kipley, 171 Ill. 44.

So long, therefore, as the record of the Civil Service Commission stands, the City is acting in good faith in paying the salary of such position or place of employment to the appointee who actually fills the position and renders the service. And this is so although the courts may subsequently decide that such employe's discharge was wrongful and that therefore he continued to be the *de jure* officer while the appointee in his stead was merely an officer *de facto*. In such case the *de jure* officer cannot recover such salary, for the Supreme Court declares that

"The rule in this State is, that the payment in good faith of the salary of an officer to a *de facto* officer constitutes a bar to an action by the *de jure* officer for the salary paid to the *de facto* officer (*People v. Schmidt*, 281 Ill. 211)."

People ex rel. McDonnell v. Thompson, 316 Ill. 11, 16.

Such is the case of the claimant. The salary which he seeks was paid to Patrick Egan as the *de facto* holder of the position who was lawfully appointed to fill the same upon the claimant's discharge therefrom, as disclosed by the opinion of the court in the case last cited. The claimant, therefore, has no valid claim for the salary he seeks.

Furthermore, Section 12 of the Civil Service Act expressly empowers the head of a department to suspend an employe for a period of thirty days pending charges before the Civil Service Commission, or for other good cause, and the claimant could not recover for this period of time even if his claim were otherwise valid.

Thomas v. City of Chicago, 273 Ill. 479.

Respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Installation of Automatic Sprinklers in Theaters.

November 20, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Pursuant to your request for an amendatory ordinance requiring all theatres to install automatic sprinkler systems, we transmit herewith an ordinance amending Sections 1291, 1292 and 1295 which, when passed and approved, will include Class IVb and Class V buildings regardless of the date of erection.

We find authority in passing this ordinance, which is retroactive in character, in the case of *Clarke v. City of Chicago*, 159 Ill. App. 20, wherein the court said:

“If the city council from observation or experience determined that certain provisions relating to the construction and operation of a theatre were necessary for the protection of persons attending such theatre, it would be as important for their safety to apply such provisions to theatres already built as to those to be built thereafter.”

Our Supreme Court, in the case of *Williams v. City of Chicago*, 266 Ill. 267, confirmed the view taken by the Appellate Court in the *Clarke* case, and sustained the City in requiring owners of buildings theretofore erected to comply with subsequent reasonable requirements imposed by ordinance.

Because these decisions are so squarely in point on the question you raise, we are of the opinion that the attached ordinances are legally sound and therefore, if passed, would constitute a valid enactment.

Yours very truly,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Prosecution of Unlicensed Plumbers.

November 20, 1925.

MR. THOMAS J. TERRELL, Master Plumber Member; MR. JULIUS NEWMAN, Journeyman Plumber Member; Board of Examiners of Plumbers, Chicago.

Dear Sirs:

Your communication of the 17th inst., addressed to the Corporation Counsel, *in re* prosecution of unlicensed plumb-

ers, has been referred to the undersigned for consideration and reply.

In your communication you state,

"The Board of Examiners of Plumbers of the City of Chicago have always recognized that section of the United States Homestead Law which provides that a man may do his own plumbing work in his own home provided it complies with the local regulations and ordinances.

"This board has also recognized the right of an architect or a general contractor taking a contract for a complete building, provided the plumbing work is sublet to a licensed master plumber who employs licensed journeymen plumbers and that this part of the work is done under his direction.

"The right, however, of an owner or contractor to employ an unlicensed plumber to do plumbing, we claim to be a direct violation of Sections 1 and 2 of the Illinois state plumbing law and also of No. 2938 of the Municipal Code."

Section 1 of Chapter 109-A, Callaghan's Illinois Statutes Annotated, provides,

"Any person now or hereafter engaging in or working at the business of plumbing in this state, either as a master plumber or employing plumber or as a journeyman plumber shall first receive a certificate thereof in accordance with the provisions of this act."

Chapter LX of The Chicago Municipal Code of 1922, in relation to plumbers and plumbing, provides as follows:

"2938. Any person now engaged in, or hereafter engaging in, or working at, the business of plumbing, in the city, either as master plumber or employing plumber, or as a journeyman plumber, shall obtain a certificate as to his competency to engage in such business, in such manner as is hereinafter provided."

The above quoted provision of the statute received the attention of our Supreme Court in the case of *Douglas v. The People*, 225 Ill. 536, wherein the act of 1897 relating to plumbers was held constitutional, and wherein the court, at page 540, said:

“The right of the citizen to follow any legitimate business, occupation or calling which he may see fit to engage in, and to use such right as a means of livelihood, is fully recognized in the constitutions of this state and of the United States. * * * Such right, however, is subject to the paramount right of the state to impose upon the enjoyment thereof any reasonable regulation the public welfare may require, and the courts have frequently held that the legislatures of the several states may impose any restraint and prescribe any requirement they may deem proper for the protection of the public against the evils resulting from the incapacity and ignorance of persons engaged in the plumbing business, as master plumbers, employers of plumbers or journeyman plumbers.”

The legislature of this State has provided against the evils resulting from the incapacity and ignorance of persons engaged in the plumbing business by the enactment of the foregoing act, and in addition thereto by the enactment of an act entitled “An Act for the regulation and inspection of tenement and lodging houses, or other places of habitation,” in force May 30, 1881, Section 1 (Cahill’s Illinois Statutes, 1925, p. 418), wherein it is provided *inter alia*,

“That it shall be the duty of any architect or architects, builder or builders of, or other person or persons interested in any projected tenement, lodging house, or other places of habitation, * * * to submit plans and specifications of any such building or buildings to the health commissioner or commissioners of such incorporated city; that the said health commissioners * * * may examine the said plans and specifications for his or their approval or rejection, as to the proposed plans for the ventilation of rooms, light and air shafts, windows, ventilation of water closets, drainage and plumbing.”

Other sections of the foregoing act provide for written instructions from the health commissioner, also for the inspection and approval of the work, also penalty for violation of the provisions of said act.

It will be noted that all plumbing work done must conform to the statutory regulations above referred to, so far as the license provisions are required, and also the ordinance with reference to the issuance of a license referring to persons or corporations who are engaged in the business of plumbing, and this necessarily involves primarily a question of fact and not one of law.

As to who are or who are not engaged in the business of plumbing, I desire to call your attention to a case I believe to be in point by analogy which involves the question of who are and who are not real estate brokers required to be licensed under the provisions of an act providing for the licensing and regulating of real estate brokers and salesmen. In the case of *Killen v. Irmiter*, 233 Ill. App. 116, the court held that the provisions of the act providing for the licensing and the regulating of real estate brokers and salesmen apply only to persons, associations, firms or corporations who, as a business or occupation, make or negotiate sales, purchases, leases, etc., of real estate for others, and not to persons who are not in the business or occupation but make or negotiate a single sale for another.

Keeping in mind the foregoing interpretation of the act relating to the licensing of real estate brokers, I now turn to the question of the right of a property owner to install plumbing on his own premises by his own labor, or to receive the assistance of an unlicensed plumber for the purpose of making such installation. I find nothing in the statute which prohibits such owner from employing an unlicensed plumber, but the safeguard to be employed is the inspection required under the provisions of the statute relating to approval and inspection. The question whether or not such unlicensed plumber is engaged in the business of plumbing as an occupation is a question of fact to be determined from the particular facts in each instance. The owner of a house might see fit to call in a neighbor who had some knowledge of plumbing and obtain his assistance in installing certain plumbing on the premises of such owner, but under the

doctrine enunciated in the case of *Killen v. Irmiter, supra*, it could hardly be said that such neighbor was engaged in the business of plumbing or was following such business as an occupation. On the other hand, if a person made it a practice as an unlicensed plumber to solicit business from various owners and contractors such fact would ordinarily be easy of ascertainment and would subject such unlicensed plumber to the penalties prescribed by law.

I am, therefore, of the opinion that a man who is not licensed in this State as a master plumber, employing plumber, or journeyman plumber would have the right to install plumbing fixtures in his own house, as long as he is the legal owner of the same, and employ a man who is not a master plumber, employing plumber or journeyman plumber to do the actual work for him, subject only to the laws governing the inspection and approval of such work. I furthermore concur in the views expressed in the opinion of the Attorney General submitted with your communication.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Supervision and Registration of Midwives.

November 24, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We have your communication of the 4th inst. in which you request this office to prepare an ordinance placing regulative powers in the Department of Health for the supervision

and registration of midwives practising in the City of Chicago.

Your request admits a doubt as to the City's power to require the registration with your department of midwives, inasmuch as the City has not been granted specific authority by our statutes so to do.

Please be advised that the Medical Practice Act of our State contains provisions requiring examination and registration of midwives, as well as for the revocation of licenses, and inasmuch as greater penalties can be invoked for violations of our statutes than our ordinances, we are of the opinion that your department can proceed under the statutes whenever the occasion requires it to be done.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Acquisition of Sites for Branch Libraries Through Power of Eminent Domain.

December 3, 1925.

MR. HARRY G. WILSON, Secretary of the Board of Directors.
Chicago Public Library.

Dear Sir:

Your communication of the 19th ult., addressed to the Corporation Counsel, requesting an opinion as to the power of the City of Chicago to acquire sites for branch libraries by the exercise of the right of eminent domain, has been referred to the undersigned for consideration and reply.

The power of eminent domain is recognized as inherent in the state, and the purpose of Section 13 of Article 3 of the Constitution is not to grant power but to limit and regulate its exercise and to protect private property against unjust use of the power.

Litchfield & Mad. R. R. Co. v. Alton & S. R. Co.,
305 Ill. 388, 393.

Section 1 of Chapter 47, page 3398, Volume 4, Callahan's Illinois Statutes Annotated, provides:

“That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the State in its corporate capacity, such compensation shall be ascertained by a jury, as hereinafter prescribed.”

Section 7, Part 3 of Article XII, Chapter 24, page 1338, Volume 2, Callahan's Illinois Statutes Annotated, provides:

“The city may exercise the right of eminent domain by condemnation proceedings in conformity with the provisions of the constitution and statutes of the State of Illinois for the acquirement of property useful, advantageous or desirable for *municipal* purposes, and the procedure in such cases shall be as nearly as may be like that provided for in an act entitled ‘An Act concerning local improvements,’ approved June 14, 1897, in force July 1, 1897, as now or hereafter from time to time amended.”

The taking of private property under the Eminent Domain Act being in derogation of common right, the grant of power to corporations for its exercise will be strictly construed.

Phillips v. Town of Scales Mound, 195 Ill. 353-359.

In *Goddard v. C. & N. W. Ry. Co.*, 202 Ill. 362, the court at page 368 said:

“Unless both the letter and the spirit of the statute confer the power it can not be exercised, and if the

words of a public grant are doubtful they are to be taken most strongly against the grantee." (Citing cases.).

To the same effect see:

Ill. Trust Co. v. St. L. I. M. & S. Ry. Co., 208 Ill. 419.

Gillette v. Aurora Rys. Co., 228 Ill. 261.

Section 1 of Chapter 81, page 4709, Volume 5, Callahan's Illinois Statutes Annotated, provides:

"That the city council of each incorporated city, whether organized under general law or special charter, shall have power to establish and maintain a public library and reading room for the use and benefit of the inhabitants of such city, and may levy a tax of not to exceed one and eight-tenths mills on the dollar annually on all the taxable property in the city * * *"

Section 2 of the foregoing act provides:

"When any city council shall have decided to establish and maintain a public library and reading room under this act, the mayor of such city shall, with the approval of the city council, proceed to appoint a board of nine directors for the same, chosen from the citizens at large with reference to their fitness for such office, and not more than one member of the city council shall be at any time a member of said board."

Section 5 of Chapter 81, *supra*, provides, *inter alia*:

"Said board shall have power to purchase or lease grounds, or to purchase, lease, erect and occupy an appropriate building or buildings for the use of said library. When a building erected or purchased by the board is not adapted to its purposes or needs the board may remodel or reconstruct such building. Such board may also, with the approval and consent of the city council, board of trustees, or board of town auditors, as the case may be, sell or authorize disposition of any real or personal property that it deems no longer necessary or useful for library purposes. * * *"

In the case of *Johnston v. City of Chicago*, 258 Ill. 494, our Supreme Court held that under the statute authorizing the establishing and maintenance of a public library and

reading room, the public library board is a part of the city government, and that such library is established by the city in its *private* as distinguished from its *governmental* functions.

In the case of *South Park Commissioners v. Ward & Co.*, 248 Ill. 299, the establishment and maintenance of free public libraries is recognized as a *public* use.

Under the foregoing section of the statute (Section 5) full power and authority is given to the board of directors of said library, "to purchase or lease ground or to purchase, lease, erect and occupy an appropriate building or buildings for the use of said library."

In the case of *Helm v. City of Grayville*, 224 Ill. 274, the court said, at page 278:

"It was said in *Gaddis v. Richland County*, 92 Ill. 119 (p. 124): 'The expression of one thing or one mode of action in an enactment is usually held to be an exclusion of all other things or modes.' This is the general rule, to which there are certain exceptions, which was recognized by the court in the language quoted, for it was there said that the expression of one thing or mode is usually held to exclude all others. The maxim, 'The expression of one thing is the exclusion of another,' should never be used to override a different purpose plainly indicated. (26 Am. & Eng. Ency. of Law, 2d Ed., 605.) The rule is well established that a grant of power may either be express or may arise by necessary implication.

While the only methods expressed in the act for acquiring a ferry landing are by purchase, lease or gift, the paramount object of the enactment was to confer power upon cities to acquire and maintain ferries, and we are of opinion it was not the intention of the legislature, and the act should not be construed to restrict the municipality to the method of acquiring land by purchase, lease or gift in the exercise of the power. We know of no good reason that could be given, as a matter affecting public policy or public welfare, why the legislature should have deemed it advisable to authorize cities to acquire land for the establishment of a ferry by purchase but inadvisable to allow them to acquire

it by condemnation, while very good reasons to the contrary might be given. The primary object of the act, as we have said, was to empower cities to establish and maintain ferries, and this grant of power being for a public purpose, we think must be held, in the absence of a contrary intention appearing, to carry with it, in addition to the methods mentioned, the right to condemn under the Eminent Domain Act when the land cannot be acquired by the modes expressly mentioned in the act. A thing within the intention of the statute is as much within the statute as if it were within the letter. (*Castner v. Walrod*, 83 Ill. 171; *Perry County v. Jefferson County*, 94 *id.* 214; *People ex rel. v. Hoffman*, 97 *id.* 234.) These views, we think, find support in *Maywood Co. v. Village of Maywood*, 140 Ill. 216."

Applying the foregoing reasoning to the subject of our inquiry, it is apparent that the object of the statute with reference to libraries was to empower cities to establish and maintain public libraries and reading rooms for the use and benefit of the inhabitants of said cities, and this grant of power, being for a public purpose, should be held, in the absence of a contrary intention appearing, to carry with it, in addition to the method mentioned, the right to condemn under the Eminent Domain Act, when land or buildings cannot be acquired by the mode expressly mentioned in the act.

I am therefore of the opinion that under the doctrine enunciated in the case of *Helm v. City of Grayville*, *supra*, that the City of Chicago has full power to acquire lands or buildings for library purposes by eminent domain.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Basis for Determining the Number of Signatures
Required on Petitions for Nominations at
Primary Elections.**

December 4, 1925.

HON. AL. F. GORMAN, City Clerk.

Dear Sir:

We are in receipt of your communication of November 30, requesting an opinion from the Corporation Counsel with reference to the basis for determining the number of signatures required upon petitions for the primary election to be held April 13th next.

The provisions of the statute governing the elements necessary in a primary petition are found in Cahill's Illinois Revised Statutes of 1925, Chapter 46, Paragraph 408, page 1125, in which is set out the form of language required in such petition. It will be observed that the signer of such petition is required to designate himself as "a member of and affiliated with" the party of the petitioner, and "a qualified primary elector of said party." Further, the person circulating the petition is required to make oath that to the best of his knowledge and belief the persons so signing the petition are qualified voters of that particular political party. Other provisions of this paragraph immediately relating to the subject-matter of your inquiry, which are designated a, b, c, d, e, etc., provide:

"Such petitions for nomination shall be signed:

(a) If for a State office, by not less than one thousand (1,000) nor more than two thousand (2,000) primary electors of his party;

(b) If for a congressional office, by at least one-half of one per cent of the qualified primary electors of his party in his congressional district, as the case may be;

(c) If for a judicial office, by at least one-half of one per cent of the qualified primary electors of his party in the district or division for which the nomination is made.

(d) If for a county office, by at least one-half of one per cent of the qualified electors of his party cast at the last preceding general election in his county: *Provided*, that if for the nomination for county commissioner of Cook County, then by at least one-half of one per cent of the qualified primary electors of his party in his county in the district or division in which such person is a candidate for nomination.

(e) If for a city or village office to be filled by the electors of the entire city or village, by at least one-half of one per cent of the qualified primary electors of his party in his city or village; if for alderman, by at least one-half of one per cent of the voters of his party of his ward."

It will be noted that in each of the provisions and throughout the section the term *primary electors* is used, with the exception of the first part of provision *d*, where the language employed is "by at least one-half of one per cent of the qualified electors of his party cast at the last preceding general election in his county," while the proviso of provision *d* returns to the qualified primary elector requirement. This provision *d* appears to be carelessly drawn, as the language of "one-half of one per cent of the qualified electors of his party *cast* at the last preceding general election" would indicate.

The last preceding general election to the April primary in 1926 would be the election held February 24, 1925, for the election of one judge of the Superior Court of Cook County for the full term. This was a general election, but one which did not require a primary election preceding it, nomination being made in convention with but one of the major political parties nominating. Therefore, the election of February 24, 1925, for one judge of the Superior Court could not possibly be the basis for determining the number of qualified primary electors for the purpose of determining the number of signatures required.

It is a fundamental rule of statutory construction that the intention of the law makers should be deduced from a view of the whole statute and all its very material parts, and with that rule in mind, in our study of said Paragraph 408, we are of the opinion that the basis for determining the number of signatures required on a nominating petition for the primary election to be held April 13, 1926 (except in the case of a state office), is "one-half of one per cent of the qualified primary electors" of each party, in the various political divisions designated in the statute, voting in the last preceding general primary election, which was held April 8, 1924, such method of computation being in our opinion the only feasible, if not the sole way, of determining the number of primary electors in the political division for which the nomination is made.

Respectfully submitted,

EDMOND L. MULCAHY,
Second Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Annuity Rights of a Minor Child Born Subsequent to July 1, 1921.

December 4, 1925.

THE RETIREMENT BOARD, Policemen's Annuity & Benefit
Fund.

Gentlemen:

Replying to your request for an opinion as to the annuity rights of a minor child born subsequent to July 1, 1921, the following is submitted:

I.

Your letter citing a pending application for annuity involving the above question refers to the application for "child's annuity" for William Gahan Kearney, born July 14, 1921, and states that the said minor is a child of William Kearney, a policeman who died Septemehr 23, 1925; that your records as well as those of the Civil Service Commission show that said William Kearney was born on April 15, 1863, from which it appears that William Kearney was upwards of 58 years of age at the time of the actual birth of the child in question.

II.

Section 44 of the P. A. & B. Fund Act provides that a child's annuity shall be granted and paid for the benefit of any child less than 18 years of age, the issue of any policeman who shall die on or after the 1st day of January, 1922, provided such child shall have been born *before such policeman attains an age of 57 years*, or before he shall have resigned or been discharged from the service.

III.

The Policemen's Annuity & Benefit Fund Act became a law on July 1, 1921. The act contains no retroactive clause, and consequently its terms were meant to apply to the future and not to the past.

The Police Pension Act of 1917 provides a pension or an allowance for the benefit of children under 18 years of age, of deceased policemen, without regard to the age of the father at the time of the birth of the child. It was clearly not the intention of the act of 1921 to take away entirely the grant of an allowance for a minor child as made in the act of 1917, since the act of 1921 provided for a similar grant of allowance, but limited it to children born before the father attained the age of 57.

In the act of 1921 an attempt was made to fix the age of 57 years as a sort of general dead line for policemen, so far as concerned the fixing of annuities and benefits for "Future Entrants," the age limit of the father in the granting of a child's annuity, and the age limit for the granting of "duty disability" benefits and "ordinary disability" benefits. The age limit, however, had reference to the future and not to the past, and should not be so construed as to deprive a policeman or his children of any rights or benefits granted to him or them under any prior pension act, unless specifically so enacted.

I V .

In Vol. 9 of Corpus Juris, at page 140, the following principle of law is stated:

"It is now settled, according to the dictates of common sense and humanity, that a child *en ventre sa mere* (in the womb of the mother) for all purposes for his own benefit is considered as absolutely born."

The award or allowance provided for minor children in the act of 1917, while payable to the widow or to the child (through its guardian in the event of the death of the widow), was an award or allowance for the benefit of the child to the same extent and in the same sense that the "child's annuity" provided for in the act of 1921 was an award or allowance for the benefit of a minor child.

William Gahan Kearney, having been *en ventre sa mere* prior to July 1, 1921, is to be considered as having been absolutely born prior to said July 1, 1921, "for all purposes for his own benefit," and the act of 1921 not being retroactive should not be construed as having deprived the said William Gahan Kearney of the benefits of the act of 1917, which said act of 1917 regarded him, long prior to July 1, 1921, "for all purposes for his own benefit" as a minor child of a policeman entitled to be considered such minor child without regard to the age of his father at the time of his procreation or birth.

V.

I am of the opinion that William Gahan Kearney is legally entitled to be treated as a minor child of William Kearney, deceased, entitled to a child's annuity as provided in the P. A. & B. F. Act of 1921.

V I.

I am of the further opinion that as to the child Nana Frances Kearney, who was born August 9, 1919, there is no question as to her being entitled to a child's annuity; and that, as to Thomas Patrick Kearney, born August 23, 1922, and James Andrew Kearney, born August 28, 1924, the act of 1921, however unintentionally, denies them the right to a child's annuity, since neither of them was legally *in esse* on July 1, 1921, or prior thereto.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Transfer From Unskilled Labor Class to Skilled Labor
Class and Back Again as Affecting Pension Rights.**

December 8, 1925.

RETIREMENT BOARD, Municipal Employees Annuity & Benefit Fund.

Gentlemen:

Replying to your request of November 25th for an opinion as to members of the unskilled labor class becoming bene-

ficiaries of the Municipal Employees Annuity & Benefit Fund through transfer to the skilled labor class and back again to the unskilled labor class, the following is submitted:

Your letter states that an employee of the Board of Education, working from the unskilled labor class, took an examination for a skilled or classified position as stock handler; that he was certified from the stock handler's list; that he accepted the position and worked one day as stock handler; that he resigned from the list and a week later withdrew his resignation; that his name was restored to the eligible list of stock handlers; that he was called again for appointment and waived certification; that he took a leave of absence from the labor list for the one day that he worked as stock handler and then was reinstated as a laborer; that the Board of Education wants to know if the acceptance of the certification of the stock handler position and the deduction from his one day's salary for the benefit of the Municipal Employees Annuity and Benefit Fund would establish this employee in the Municipal Employees Annuity and Benefit Fund, so that he could contribute to it while working from the unskilled labor class.

Section 1 of the Municipal Employees Annuity and Benefit Fund Act provides that the Municipal Employees Annuity and Benefit Fund is created "for the benefit of municipal employees employed by such city and the municipal employees employed by the board of education of such city," etc.

Section 12 of the Municipal Employees Annuity and Benefit Fund Act defines the term "municipal employee" and provides further that the definition shall *not* include:

"Any person employed in a position classified by the civil service commission of such city as in the labor service * * * unless such person employed in a position classified as in the labor service shall be a participant in a municipal pension fund in operation in such city at the time this Act shall come in force and effect therein, or unless such person employed in a position classified as in the labor service * * *, if he

shall be in the service of such city or board of education at the time this Act shall come in force and effect in such city and shall not be a participant in any such pension fund shall within six months thereafter apply in writing to the retirement board to be included under the provisions of this Act, or unless such person if he shall not be in the service of such city or such board of education at the time this Act shall come in force and effect * * * in such city, shall within six months from and after the date upon which he shall enter the service * * * make a like application to the retirement board."

It appears from the provisions of the act above quoted that the act itself provides that the only method in which and by which a person employed in the labor service of the City can become a beneficiary of the Municipal Employees Annuity and Benefit Fund is by an application filed to so participate within six months after the act came into effect or after the date upon which he shall enter the service. There is no other method provided, and when an employee in a classified service of the City quits his position in the classified service and enters upon work in the labor division, he puts himself outside the application of the act, other than as to such rights as are given to men in the labor service.

I am of the opinion that an employee in the labor service cannot become a beneficiary under the provisions of the Municipal Employees Annuity and Benefit Fund Act, as such employee, in any manner other than as provided in Section 12 of the Municipal Employees Annuity and Benefit Fund Act, above quoted.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Method of Calculating Annuities.

December 8, 1925.

RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen :

Mr. Donald F. Campbell, Actuary, has requested an opinion as to the legality of a certain method of computation, and the following is submitted :

Mr. Campbell's letter states that the payroll clerk failed to deduct from the salary of an employee for the purpose of the Municipal Employees Annuity and Benefit Fund Act; that the employee desires to retire on an annuity; that through fault of the payroll clerk the employee owes a sum of money to the fund for salary deductions not made; that Mr. Campbell desires to know whether or not it is legal to compute the annuity on the assumption that the employee paid all the amounts required and the City paid the amounts required to be paid by it, and after the computations thus made are completed deduct the amount of the indebtedness from the total obtained and apply the balance to provide the annuity; that the net result to the employee and to the City would be the same mathematically as if the employee had actually made the payments; that the only question is the legality of the procedure.

The Municipal Employees Annuity and Benefit Fund Act requires that to provide age and service annuities, deductions shall be made from each payment of the salary of a municipal employee beneficiary under the act at the times such payments of salary are payable, and that concurrent with each such deduction from salary the City shall contribute a certain amount. These deductions necessarily must or should be made by the City before or at the time of the

payment of salary, and Section 63 of the Municipal Employees Annuity and Benefit Fund Act makes it the duty of all officers, officials and employees of the City to perform any and all acts required to carry out the intent and purposes of the act, which it shall be necessary for any such officer, official or clerk to perform so that the provisions of the act may be complied with and the intent and purposes thereof fulfilled.

The fact that through some error deductions were not made as required by the act cannot deprive the employee of the annuity to which he has a right under the act, and any method of procedure, in connection with the allocation of accounts and computation of annuities, which will secure to such employee his rights under the act would be legal and equitable.

I am of the opinion that in a case such as the one above cited it would be legal to compute the annuities on the assumption that the employee had paid all the sums required and the City had paid all the sums required to be paid by it, and, after the computations thus made are completed, to deduct the amount of indebtedness from the total obtained and apply the balance to computing the annuity; or, the employee could be permitted to pay into the fund the salary deductions which should have been made, but which were paid to him in error, together with interest on each such deduction at the rate of 4 per cent per annum, if he desired to have his annuity computed on the total sum which should have been accumulated to his credit.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Claim of Disability Pensioner to Pension Payments
Based on Salary Appropriations by the City
Council.**

December 11, 1925.

BOARD OF TRUSTEES, Firemen's Pension Fund.

Gentlemen :

Replying to your request of December 7th for an opinion as to the right of a disability pensioner to be paid a monthly pension based upon the salary of his former rank in the department as such salary shall be fixed each year by the City Council of the City of Chicago in its annual appropriations, the following is submitted :

Your letter, enclosing a communication from Charles J. Sup, states that on January 1, 1924, he was retired from the Chicago Fire Department with the rank of fireman, first class, due to disability incurred December 25, 1922, in the line of duty; that the salary attached to said rank on that date was \$2,000 per annum; that since retirement he has received a pension of \$83.33 per month, based upon that salary; that on October 1, 1924, the salary attached to the rank of fireman, first class, was increased to \$2,200 per annum; that Section 9 of the act of 1917 creating the Firemen's Pension Fund provides in part: "The board shall order and direct that such fireman shall be paid a monthly pension equal to one-half the amount of salary attached to the rank which he may have held in the fire service at the date of his retirement;" that he contends that he is entitled to the benefits of the increase of the salary attached to his rank; and that he requests payment to him of back pension based on the salary of \$2,200 per annum for the period from October 1, 1924, to November 1, 1925, of \$8.33 per month, and that he henceforth be paid a monthly pension of \$91.66 per month.

I.

The Firemen's Pension Act of 1917, as amended in 1925, provides for two classes of pensions:

(a) Age and Service Pension payable to a fireman who has served twenty years as a fireman and who has attained age 50 years;

(b) Disability Pension payable to fireman who, while in active service or on leave of absence, becomes so physically or mentally disabled as to render necessary his retirement from active service.

The amount of the pension to be paid is the same for both classes.

II.

Section 8 of the act provides that the age and service pensioners shall be paid "A monthly pension equal to one-half the amount of monthly salary attached to the rank which he may have held in the fire service at the date of his retirement."

Section 9 of the act provides that a disability pensioner shall be paid "A monthly pension equal to one-half the amount of monthly salary attached to the rank which he may have held in such fire service at the date of his retirement."

III.

In the case of *O'Neill v. Harding et al.*, the Appellate Court for the First District of Illinois, in passing on the petition of a fireman who was receiving an age and service pension, to be granted an increase of pension based on the increased salary being paid to members of his rank in the department, held that the expression "salary attached to the rank which he may have held in the fire service at the time of his retirement" indicated that the intention of the statute is to fix the pension at one-half the amount of salary that the fireman is receiving at the time of his retirement. In deciding this case, the court used the following language:

“It will be observed that only the words ‘attached to’ are used and that they are not followed by any words which might impute a meaning of future operation of the statute such as the words ‘and which may hereafter attach to.’ The words ‘attached to’ seem to limit the pension to one-half the amount of the salary of the fireman at the time he retires. In our view, if the legislature had intended that the statute should have the effect attributed to it by counsel for the petitioner, the legislature would have expressed such an intention clearly and expressly and would not have left the question of intention in a matter of this importance to be determined by conjecture.”

The court denied the petition of O’Neill for an increase of pension.

I V .

While it is true that this holding of the court was made in the case of a pensioner who was in receipt of an age and service pension and who had retired from the department, it apparently applies with equal force to a disability pensioner who has retired from active service during the period of his disability. The disability pensioner, so far as any service to the City in the fire service is concerned, is as much “retired” for all practical purposes as is the age and service pensioner. The only difference between the two, so far as their relationship to the fire service is concerned, is that the disability pensioner has the possibility of going back on the payroll as an active fireman upon recovering from his disability, while the age and service pensioner has no such prospect. The basis for the fixing of the pension of both classes is the same, and it cannot be assumed that the phrase “salary attached to the rank which he may have held in the fire service at the date of his retirement” has one meaning in Section 8 of the act and a different meaning in Section 9 of the same act. This phrase was construed by the Appellate Court as hereinabove set out, and our Supreme Court, in passing on the same case of *O’Neill v. Harding et al.*, reported in 314 Ill. 516, said “the Appellate Court properly

construed the statute." The said phrase, therefore, must be given that construction wherever it appears in the act.

V.

I am of the opinion that Mr. Sup is not entitled to an increase of pension based on salary appropriations made by the City Council for the fire service subsequent to the retirement of Mr. Sup from active service.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Service Credits to Non-Members of Police Department.

December 11, 1925.

RETIREMENT BOARD, Policemen's Annuity and Benefit Fund.

Gentlemen:

Replying to your request of December 5, 1925, for an opinion as to the right of Mrs. Mary White, a matron, to be credited for pension purposes for the period of time she worked in the House of Correction, the following is submitted:

Your letter states that Mary White worked in the House of Correction as a matron from January 28, 1916, to January 18, 1923; that on the latter date she was transferred as a matron to the Police Department, District 1-A; that on your records she is considered a "future entrant"; that Mrs. White feels that she is entitled to credit for the time in question and is willing to pay the necessary salary deduc-

tions that would have been made during that period had she worked for the Police Department.

I.

There does not appear to be any provision in the Policemen's Annuity and Benefit Fund Act of 1921, nor in the amendment to said act of 1925, which gives to your Honorable Body power to give a service credit for annuity purposes for work done or services rendered in any other department of the City of Chicago to any person becoming a member of the police force.

Section 12 of the act includes police matrons in the definition of the word "policeman," but as Mrs. White had not become a police matron until January 18, 1923, she cannot be said to have been a "policeman" or a member of the police force prior to that date for the purpose of fixing her annuity rights.

II.

There does not appear to be in the law any grant of power to your Honorable Body to accept from Mrs. White an amount equal to salary deductions which would have been made had she been a member of the police force for the years she served as a matron in the House of Correction, and before she became a member of the said police force.

III.

I am of the opinion that, under the law as it exists at the present time, Mrs. White cannot be allowed service credit for the period in question.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Power of Health Department to Cause Removal of Gas Water Heaters.

December 14, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We have your communication of December 3d in which you desire an opinion from this office as to whether or not your department can cause the removal of gas water heaters in operation prior to the passage of Article XI (gas water heaters) of Chapter LX of The Chicago Municipal Code of 1922.

Please be advised that the article on the subject-matter when passed by the City Council dealt with gas heaters which were thereafter to be installed, except Section 3063, reading as follows:

“3063. DUTY OF OWNER OR PERSON IN POSSESSION OF HEATER.) It shall be the duty of the owner or person in possession or control of any building or structure where gas water heaters have heretofore been installed to make such heaters comply with the requirements of this article, and it shall be unlawful for any person to use any such heater until it shall have been made to conform to the provisions of this article.”

This reservation and reference to all gas water heaters in use prior to the passage of the ordinance in question gives your department sufficient authority to cause all such heaters to conform to the ordinances before the same can be made use of. Care should be exercised by your department not to remove the heaters as is contemplated by your letter, for the reason that Section 3063 only prohibits persons from using such heaters and does not invest your department with

power to remove because of their failure to conform with the ordinance.

Very truly yours,

JAY A. SCHILLER,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Liability of Secretary of Board of Local Improvements.

December 14, 1925.

HON. EDWARD J. GLACKIN, Secretary, Board of Local Improvements.

Dear Sir:

In your letter of recent date you submit two questions, both of which relate to your liability while acting in your ministerial capacity as Secretary of the Board of Local Improvements for things done by the board which you did not vote for, and where you have not agreed or consented in your capacity as member of the Board of Local Improvements to the action taken by such board.

Your first question is whether you can be held liable for any action taken at a meeting at which you were not present if you signed a document, notice or voucher approved at such meeting, in your official capacity of Secretary of the Board of Local Improvements. We know of no theory under which such act can be ascribed to you in any way. As secretary of the board, you are acting in a purely ministerial capacity, and the rule is that such officer cannot question the validity of the proceedings which he is called upon to record or certify. Mechem on Public Officers states the rule as follows (Section 523):

“It is not within the scope of the duties of a ministerial officer to pass upon the validity of laws, instruc-

tions or proceedings *prima facie* valid, and requiring his action. His only duty in such a case is obedience, and, as will be seen hereafter, he can not excuse himself by undertaking to show the unconstitutionality or other invalidity of the law, or the irregularity of the proceedings."

Your second question is, whether you can be held liable for the action taken at a meeting at which you were present where you voted "No" on a proposition, if, as secretary of the board, you signed a document, notice, order or voucher approved at the meeting where you either voted "No" or were recorded as "not voting."

Precisely the same rule applies in this case as in the first instance. Acting as you do in a dual capacity, you cannot refuse to perform your duties and functions as secretary of the board merely because you have a vote in the body and participate in its deliberations. When action is taken by that body it becomes the official action, and you, as secretary, are bound to record and certify to the same in like manner as if you had not participated in the deliberations.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Proposed Transfer of Appropriations From Bond Funds.

December 14, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

The Bridge Engineer has submitted a request for transfer of appropriations in order to take care of work on

Roosevelt Road bridge, Roosevelt Road viaduct and 134th Street bridge. This has received the approval of the City Engineer and your own approval, and the only question is whether it will be satisfactory to the Department of Finance.

The first transfer asked for contemplates taking \$48,300 from the Cicero Avenue bridge appropriation out of the bridge bond fund and placing \$11,000 to the credit of Roosevelt Road bridge, and \$37,300 to the credit of 134th Street bridge. The only appropriation for Roosevelt Road bridge is from the Roosevelt Road Bridge and Viaduct Bond Fund, and the only appropriation for 134th Street bridge is from the bridge and viaduct construction bond fund.

The other transfer asked for is \$24,917.72 from the California Avenue bridge appropriation taken from the bridge bond fund, and \$75,082.28 from the 130th Street bridge appropriation taken out of the bridge and viaduct construction bond fund and placing this total of \$100,000 to the credit of the Roosevelt Road viaduct appropriation. The only appropriation for this viaduct is from the Roosevelt Road Bridge and Viaduct Bond Fund.

Although we have repeatedly indicated our desire to give a broad interpretation to the statutory authority to make transfers, the transfers proposed by the Bridge Engineer involve three propositions to which we have never given our entire acquiescence. One of these is that appropriations from different bond funds may be used interchangeably as long as the purposes for which they are used come, in each case, within the purpose of the bond issue. Another is, that a new appropriation for a purpose not mentioned originally in the appropriation bill may be set up under the form of a transfer. The third is that a new appropriation may be made at any time of the year from the proceeds of a bond fund which have not been entirely appropriated.

The first of these propositions amounts practically to saying that, although various bridge bond issues have been authorized from time to time, the proceeds can all be put into one common fund. We do not believe this is sound financing, even though it is quite possible in an individual

instance that the court will sanction an appropriation from any one of the various bridge bond funds. To us it would seem as though these various bond funds stand on precisely the same footing as appropriations for separate departments. If this analogy is recognized, then there will be no such thing as transferring from one to another.

So far as making new appropriations by way of transfer is concerned, it is giving a broader definition to the word "transfer" than is usually ascribed to it. We have always suggested that rather than set up a new appropriation some shift should be made to an appropriation already in existence that can be made available for the purpose. We believe it would be the better part of wisdom to pursue this course wherever possible.

Finally, with respect to making appropriations at any time of the year from bond funds, we have always believed that such a course would probably be held lawful by the courts, because the original voting of the bond issue constitutes an appropriation for the general purpose and the distribution of the money is a matter of detail. Yet, we have always advised against that for reasons which we need not enlarge upon in this opinion. If the City's officers wish to take the ground that they can at this time make appropriations from bond funds, we would not hold it unlawful, but we would advise against it as we have done before.

In view of the position we take, therefore, we recommend that, instead of making an appropriation for the 134th Street bridge out of the proceeds of the Cicero Avenue bridge appropriation, such transfer be made from the 130th Street bridge appropriation.

We further recommend that, instead of drawing on the Cicero Avenue bridge appropriation and the 130th Street bridge appropriation for purposes of Roosevelt Road bridge and Roosevelt Road viaduct, a transfer be made from what is set up in the annual appropriation bill as "Deposits made by Railroad Companies to reimburse bond funds on account of construction of Roosevelt Road viaduct." This can be done unless some obstacle presents itself that we have not been

informed about, such, for instance, as moneys having been drawn from an unauthorized source. Our reason for making this recommendation is that such deposits were made for the express purpose of reimbursing bond funds that were drawn on for this particular construction work, and since we are assuming that this was done with proper authority at the time, the moneys realized from these deposits can either be used for that purpose or they should be used to reimburse the bond fund from which they were drawn. From the information at hand we understand that there is enough money available in the appropriations made under the heading last mentioned, that is to say, from "deposits made by railroad companies," to meet the necessities of Roosevelt Road bridge and Roosevelt Road viaduct.

We have gone into this matter somewhat in detail for the reason that we have understood that the treasurer wanted to be set right in regard to the matter and have a full understanding of what is to be done in case the Law Department held that it was possible to make the necessary transfers.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Installation of Additional Tank at Non-Conforming Gas Filling Station in Annexed Territory.

December 16, 1925.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of November 23d.

June 3, 1924, when Norwood Township was annexed to Chicago, a gasoline station was being conducted at 6136

Irving Park boulevard, which location was included in the annexed territory. After the annexation the proprietor of the gasoline station applied for a license to continue the station and you state you approved the application. This gasoline station is within 200 feet of a public school, and the proprietor now seeks to install an additional tank. You wish to be advised whether it would be lawful to issue a permit to install the additional tank.

We do not think it would. The moment that Norwood Township became annexed to Chicago, it became subject to all the ordinances in force in the City of Chicago. Among those ordinances is Section 2279 of The Chicago Municipal Code of 1922, which provides in part as follows:

“No such tank or tanks shall be installed in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot of ground used for a school, hospital, church or theater.”

The above section makes it unlawful to install a tank for the storage of gasoline within 200 feet of a school, and you are therefore, in our judgment, precluded from issuing a permit for the installation of the additional tank within 200 feet of a public school, notwithstanding the fact that the oil station was in existence before Norwood Township became a part of the City of Chicago and subject to its ordinances. Whatever right the proprietor of the gasoline station may have to continue in the operation of the station as it existed when Norwood Township became annexed to the City of Chicago, no additional tanks may be installed at this time as a part of said filling station within 200 feet of a public school, by reason of the above provision of Section 2279.

You also propound to us the following questions:

1. May you lawfully issue permits for additional tankage in existing gasoline stations without further frontage consents?

2. May you lawfully issue permits for additional tankage in existing gasoline stations when such existing

stations lie within 200 feet of a lot or plot of ground used for a theater, church, school or hospital?

3. May you lawfully issue permits for additional tankage in existing gasoline stations where the station is now located in a residence or apartment district?

Relative to the first question, would respectfully advise you that it is the intent of the signers of the frontage consent petition as shown by the petition itself that governs in such matters.

Section 2279, Paragraph (b) of The Chicago Municipal Code of 1922 reads in part as follows:

“(b) It shall be unlawful to install any tank or tanks for the storage of any of the liquids mentioned in section 2277 in any lot or plot of ground without first obtaining the written consents of the property owners representing the majority of the total frontage in feet of any lot or plot of ground lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot or plot of ground upon which said tank or tanks is or are to be installed; provided, however, that for the purpose of this ordinance only the frontage of any such lot or plot of ground or that part of the frontage of any part of such lot or plot of ground as comes within the 150 foot limit herein prescribed shall be considered; and, further provided that, any and all petitions containing such consents of property owners shall be based on and contain the legal description of the property affected.”

One of the requirements of the above provision, it will be noted, is that the petition containing the consents of the adjacent property owners shall contain the legal description of the property on which the tank or tanks shall be placed. It is apparent that the purpose of this requirement is to make certain to the City authorities and to those signing the frontage consent petition the exact lot or plot of ground that it is intended to use for the installation of tanks. If it should be desired thereafter to install tanks upon land not included in the legal description set forth in the frontage consent petition, even though it may be contiguous

thereto, new frontage consents would undoubtedly be necessary.

Where adjacent property owners have signed a frontage consent petition for the installation of a tank or tanks, which petition specifically described and limited the amount of tankage to be installed, we think that additional tankage exceeding the capacity to which the adjacent property owners previously assented could not later be installed without new frontage consents being filed covering such additional tankage. The reason for this would be that the adjacent property owners have expressly limited their consent to the installation of a tank or tanks of a certain size, and it would defeat the purpose of the ordinance if tanks of a larger size were to be installed later without their consenting thereto.

If, however, the signers of an original frontage consent petition have not limited or qualified in any way their consent to the amount of tankage that may be installed in the particular plot of ground legally described in the petition, but have merely given consent to the installation of tanks therein, then, in our judgment, new frontage consents need not be filed in order that additional tankage may be installed. This for the reason that the owners of the requisite amount of frontage have already signified their consent to have "tanks" without limitation installed in the lot or plot of ground legally described in the petition.

In an opinion heretofore written by this department in a somewhat analogous case, it was stated as follows:

"The question of frontage consents for extensions has frequently arisen where the hospital structure itself occupied only a portion of the lot or tract of ground used for hospital purposes. In all these cases we have held that the original frontage consents authorizing the construction of a hospital on the tract of ground in question were sufficient to cover any additions thereto erected on the ground for which frontage consents were secured, but we have in these cases been careful to distinguish between such extensions and the question which we felt sure would sooner or later arise, as to whether

such consents would be necessary where the proposed addition went onto new ground not used for hospital purposes."

We have been shown the form of frontage consent petition in vogue in your department covering frontage consents for the installation of tanks. It is headed "*Petition to locate tanks for the sale or storage of oils.*" Where such a petition is signed assenting without limitation or qualification to the installation of "tanks" on the plot of ground legally described in the petition, we think that an additional tank or tankage may be later installed without the securing of new or additional frontage consents. This is true, in our opinion, because the intent of the consents, as shown upon the face of the petition, is to the installation of tanks without limitation as to size or quantity in the plot of ground legally described in the petition, subject of course to the provisions of Section 2279 governing the subject.

Paragraph (a) of Section 2279 provides that, before any tank may be installed, the Chief of Fire Prevention and Public Safety shall first inspect the site, and if the site is satisfactory the applicant shall pay certain fees depending upon the tankage capacity to cover the cost of inspection, and it is further provided that no tank or outfit may be used until the installation material and workmanship have been approved by the Chief of Fire Prevention and Public Safety. By this provision it will be seen that the matter is at all times under the control of your department and that the public safety is thus assured by the proper inspection of the installation of the tank or tanks regardless of the tank capacity thereof.

Relative to your question No. 2, it is our opinion that permits may not lawfully be issued for additional tankage in existing gasoline stations when such stations lie within 200 feet of a lot or plot of ground used for theater, church school or hospital. Section 2279, as above quoted, prohibits the installation of such tanks. The fact that an oil station may have been in operation before the establishment of a

theater, church, school or hospital would confer upon the owner of the oil station no right to install additional tankage after the establishment of the theater, church, school or hospital within 200 feet of the lot or plot of ground in which it is proposed to install the additional tankage.

Relative to question No. 3, it is our opinion that it would be unlawful to issue permits for additional tankage in existing gasoline stations where the station is now located in a residence or apartment district. Such a use of property is what is termed by the Zoning Ordinance a non-conforming use. A non-conforming use is "a use which does not comply with the regulations of the use district in which it is situated." By the provisions of Section 14 of the Zoning Ordinance a non-conforming use existing at the time of the passage of the Zoning Ordinance may be continued, but it may not be extended. The installation of an additional tank or tanks would clearly be the extension of such a non-conforming use, and that is prohibited by the Zoning Ordinance.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Obligation of City for Hose Delivered to Fire Department on Emergency Order.

December 22, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Alderman:

Your communication of the 21st inst., in which you inquire whether or not there is any legal obligation upon the

City to pay for hose delivered by the Eureka Fire Hose Company and the New York Belting and Packing Company to the City of Chicago under a tentative agreement between the Fire Commissioner and the Committee on Finance, received.

Our understanding of these transactions is that certain hose was ordered by the Fire Commissioner which, because of an alleged emergency existing, was not negotiated for nor acquired in accordance with our ordinances setting forth the procedure necessary to be followed to constitute valid contracts for supplies.

We note that a council order approving the Eureka compromise payment of \$10,000, on account, was passed by the City Council at its regular meeting held on November 9, 1925. Although it does seem that the Eureka Company's situation fits that of the New York Company so closely that any action other than approval of a like compromise for the latter company would appear to be an act of inconsistency on the part of the Council, yet we are requested to advise you merely as to the law applicable to a given state of facts, which we shall attempt to do.

On June 30, 1925, the special committee appointed to investigate the Fire Department reported its findings and recommendations to the City Council, and on page 817 of the Journal of the Proceedings of the City Council of the regular meeting held June 30, 1925, there appears, as a part of said report, the following paragraph:

"In December, 1923, the then Fire Commissioner placed an emergency order with the Eureka Fire Hose Company for 10,000 feet of 2 1/2 inch fire hose, and with the New York Belting and Packing Company for an equal amount. This hose was delivered early in 1924 and put in service. An investigation by the Fire Department and the Department of Weights and Measures showed a shortage of 90 feet in the total length of hose delivered by one company, and in another case, a shortage of 135 feet."

It is to be noted that merely *orders* were placed with these companies, in contravention of law relating to deal-

ings involving city contracts for supplies, and such being the case, the City is not obligated to pay the price of \$1.30 per foot for hose agreed upon by an executive head acting without lawful authority. The City, however, having accepted the hose and having made use thereof, is bound to pay a sum equivalent to its reasonable value, but no more.

Your committee, then, may quite properly disregard the figure at \$1.30 per foot in arriving at a settlement for this hose, because the doctrine of *quantum valebat* may be invoked in this instance, inasmuch as these companies in having had previous contracts with the City should have known the formal requirements of contractual relationship which are necessary when dealing with municipalities.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Proposed Ordinance Declaring Noxious Weeds a Nuisance.

December 23, 1925.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

You have asked us to examine into the ordinance, passed on December 16, 1925, declaring the growing of noxious weeds on vacant lots a nuisance and fixing penalties therefor. You state that it is your desire to have the ordinance in such form that it will stand the test of validity in case it is attacked.

The ordinance in question mentions a number of noxious weeds which undoubtedly have some bearing on the public

health, and it also includes within its terms "rank high weeds or grass extending higher than one foot from the ground." Regulation having for its aim the control and possible suppression of both classes of weeds, in our opinion, is within the power of the City Council.

The first of these classes can be regulated from the standpoint of health, the latter from the standpoint of morality, fire hazard, etc. It is probable, however, that in the case of the latter, at least, the courts would apply the rule that such regulation would be unreasonable in the case of vacant lots of large extent covering many acres in parts of the City that are sparsely settled. Such rule has been announced in cases involving flagmen at railroad crossings, billboards on vacant lots, and other cases of a similar nature. (See *City of Chicago v. Gunning*, 214 Ill. 628.)

Some question has been raised as to whether or not the agent of the owner of vacant lots could be held liable under such an ordinance. On this point we believe that the nature of the agency will necessarily control. If an agent simply has charge of the property for purposes of sale and to pay the taxes, etc., it is doubtful whether he would be liable for keeping it in such condition as to incur the penalties of the ordinance; but if he has control of it in the sense that he has authority to improve it and rent it out to a tenant or keep up whatever improvements there are on the property, we believe he would be amenable to the provisions of the ordinance.

With respect to the clause providing that a separate and distinct offense is committed each day that the growth of the proscribed weeds is permitted contrary to the ordinance, our courts have held that such cumulative penalties are lawful; in fact, the very recent case of *City of Chicago v. C. B. & Q. R. R. Co.*, general number 16163, decided only last week by the Supreme Court, holds in favor of the City in a case where penalties were imposed in this way.

We are, therefore, of the opinion that an ordinance of this kind would stand if modified as we have suggested, but

that there is doubt unless such modification is made. To make certain that the ordinance will be proof against attack, we recommend that each one of the specific weeds mentioned should be considered from the standpoint of the spread of disease, that the provision in regard to high weeds and grass be limited to the densely populated sections of the city, and that the agent who is to be held liable should be specifically described.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Changing Determination of Periods of Prior Service for Purposes of Pension.

December 23, 1925.

D. F. CAMPBELL, Esq., Actuary, Municipal Employees Annuity and Benefit Fund.

Dear Sir:

Replying to your letter of December 16th, relative to changing determination of periods of prior service, the following is submitted:

Your letter states that an employee filed his regular papers on November 29, 1921; that the Retirement Board ordered a certificate for him, on the basis of the service he claimed, on September 25, 1923; that this employee appeared again on September 25, 1925, with new papers, alleging five years of service between 1891 and 1896, during which period there are no books of the City of Chicago from which this service can be checked.

Paragraph "H" of Section 6 of the Municipal Employees Annuity and Benefit Fund Act requires the Retire-

ment Board to determine the various periods of service rendered by municipal employees prior to January 1, 1922, and provides that such determination "shall be conclusive as to any period of such service unless said Retirement Board shall reconsider any case within two years from the date of such determination and should change the determination in such case."

More than two years having elapsed since the determination made in the case of the employee in question and the issuance of a certificate to him on the basis of the service he claimed, I am of the opinion that it is now too late for the board to reconsider such determination under the act creating the board.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Control of Department of Health Over Midwives.

December 23, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

Your communication addressed to the Corporation Counsel with reference to the control the Department of Health may exert over existing laws pertaining to midwives, has been referred to the undersigned for consideration and reply.

Specifically you ask: (1) To what legal process has the Health Department now recourse. (2) What further process is needed and the method involved in obtaining such action.

The Medical Practice Act, Chapter 91 of Callahan's Statutes Annotated, provides that no persons shall practice midwifery without a valid existing license to so do, and that no persons shall receive such a license unless they shall pass an examination as to their qualifications therefor by and satisfactorily to the Department of Registration and Education of the State of Illinois. The license fee is fixed at \$3, and the scope of the examination to be held is left to the discretion of the above named department.

Section 16 of the foregoing act sets forth grounds for which a license may be refused, revoked or suspended by said department, and Section 25 makes it a misdemeanor to practice midwifery without a license, and Section 27 makes it a misdemeanor for a midwife to treat human ailments in any manner not constituting midwifery.

The proceedings to be had with reference to the revocation or suspension of licenses are clearly set forth in the statute, and contemplate a hearing on specific charges, after notice to the person charged in the manner designated in Section 17 of said act.

The proceedings to be had with reference to the prosecutions under Sections 25 and 27 above referred to do not appear to be limited either to the department or to any individual, and in the absence of such limitation, such prosecutions in my opinion can be properly instituted by any one having sufficient knowledge of the facts. The ordinary procedure would be to proceed by information in the Municipal Court of Chicago in cases arising within the City of Chicago, such complaint or information to be sworn to by the person having knowledge of the facts in the particular case involved.

Respectfully submitted,

ROY S. GASKILL,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

**Exchange Between Railroad Company and Park Board
of Property Lying Within Boundaries of Lake
Front Improvement.**

December 24, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication, addressed to the Corporation Counsel, requesting an opinion as to whether or not a proposed exchange between the Illinois Central Railroad Company and the South Park Commissioners, of certain property lying within the boundaries of what is commonly known as the Lake Front Improvement, can be made without consideration of the ordinance of July 21, 1919, known as the Lake Front Ordinance, and also, whether or not the approval of the City is necessary before any of the other parties to said ordinance can legally alter property lines where the interests of the City are not affected, which alterations may or may not result to the mutual advantage of the parties making the same, has been referred to the undersigned for consideration and reply.

At the outset we are confronted with an ordinance which clearly contemplates a comprehensive improvement in its entirety. Certain obligations are imposed upon the Central Company, the Commissioners, and upon other parties who have accepted the ordinance, some of which, pertinent to our present inquiry, are as follows:

In and by Section 3 of Article II of the Lake Front Ordinance, passed July 21, 1919, it is provided:

“Subject to the conditions, limitations and provisions of this ordinance the City hereby approves:

“a. The plan of the Commissioners for constructing the park extension work, by filling in and reclaiming the submerged lands under the waters of Lake Michigan

along the shore * * * substantially as indicated by the areas colored green and brown on Plat A."

(See Plat A accompanying ordinance.)

"b. The plan of the Central Company for filling in and reclaiming the submerged lands within the area colored red on Plat A, the boundaries of which are more particularly described in Schedule III, hereby made a part of this ordinance, and all land lying between the lands of the Commissioners and the present right-of-way of the Central Company. Subject to the conditions, limitations and provisions of this ordinance, the lands of the Central Company may be used for general railroad purposes including the laying of tracks thereon."

In and by Section 5 of Article II of said ordinance it is provided:

"The Central Company * * * agrees:

"d. That the Central Company will fill in the portions colored red on Plat A and complete the reclamation thereof, in conformity with the requirements as to time and method of reclamation set forth in Specification J, hereby made a part hereof."

In and by Section 6 of Article II of said ordinance it is provided:

"The Commissioners, by the acceptance of this ordinance * * * agree:

"b. That the Commissioners shall proceed * * * to fill in the portions colored green on Plat A, * * * all in conformity with the requirements * * * as set forth in Specification J."

In and by Specification J, it is provided:

"The material used for the filling in or reclaiming of submerged lands within the boundaries provided for in this ordinance by the Central Company and the Commissioners, or either of them, shall consist of sand, earth, clay, cinders, slag, or other material approved by the Commissioner of Public Works of the City, and the General Superintendent of the Commissioners as to the material deposited on the lands of the Central Company and the lands of the Commissioners, respectively."

* * * * *

“All filling shall be retained by suitable bulkheads or other protection, and, should any of the filling used be of a kind that would contaminate the waters of the lake, such filling shall be confined within watertight bulkheads approved by the Commissioner of Public Works of the City of Chicago.”

Under the provisions of Schedule III of said ordinance, the boundaries of the submerged lands to be reclaimed by the Central Company are as follows:

“All that area or parcel of land bounded as follows: * * * Also that triangular tract of land lying southwest of the intersection of the north line of East Forty-ninth street extended east with a line twelve (12) feet east of and parallel to the line between Section Eleven (11) and Section Twelve (12), Township Thirty-eight (38) North, Range Fourteen (14) East, extended north.”

A reference to Plat A, accompanying said ordinance, clearly visualizes the physical situation involved concerning a triangular piece of submerged land (owned by the Central Company, and to be transferred to the Commissioners) lying south of the north line of 49th street extended east, and a reference to the blue-print plat submitted with your letter clearly indicates, within red lines, a triangular piece of land to be transferred by the Commissioners to the Central Company. The obligations assumed by the Central Company and by the Commissioners, with reference to the “filling in or reclamation” of certain lands within the boundaries of said improvement, are now to be exchanged, together with a small parcel of land. This being so, it can hardly be said that the City is not an interested party, inasmuch as Section 34 of Article VIII of said ordinance provides:

“This ordinance and all of its provisions, when accepted by the Commissioners and the Central Company, and the railroad companies mentioned in Section 36 hereof, shall be taken and construed as a contract between the City, the Commissioners, the Central Company and said railroad companies, and by every one of them, with each and all of the others, that each will assent to, authorize and permit all things to be done which any one

of said parties is required, authorized or permitted to do by the conditions, provisions and terms of this ordinance, and that each will, on its part, do all things it may be required to do for the proper fulfillment of the purposes of this ordinance; provided, however, that any provision hereof establishing rights or obligations as between the City and the Commissioners may, by agreement between them and without the consent of the Central Company, be altered or changed in any way not affecting the property of the Central Company, or rights specifically conferred on it by this ordinance."

By reason of the foregoing provisions of the ordinance I am of the opinion that the exchange of the property in question cannot be made without consideration of the terms of said ordinance, and that the City should be notified of and acquiesce therein before such exchange is consummated.

With reference to the alteration of property lines by other parties to the ordinance "where the interests of the City are not affected," it is my opinion that such phrase is ambiguous. The City has vital interests involved in the performance of the obligations and conditions imposed by said ordinance, exclusive of ownership of certain lands, and such interests are fully protected by the terms of the ordinance. The City has bestowed certain benefits on the Central Company and on the Commissioners. It has also assumed certain obligations and received certain benefits. The entire proposition is interlocking in its essential features and requires the good faith co-operation of all parties to said ordinance, and in my opinion the practical operation of said ordinance requires the continual approval and direction of the Commissioner of Public Works.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Proper Classification of Buildings Known as Apartment Hotels.

December 28, 1925.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge the receipt of your letter of December 19th requesting the views of this department as to the proper classification of a building to be erected at 201 East Delaware place, the plans of which you enclose.

A casual inspection of these plans shows that this proposed building is what is now commonly known as an apartment hotel. The first floor contains a hotel lobby, lounging room, rest rooms, hotel office, manager's office, passenger and service elevators and other hotel features. The second floor contains a great many single rooms with bath. The floors, from the third to the sixteenth, contain suites of rooms, with hotel layout on each floor, each suite consisting of a living room, chamber, alcove, bath, kitchenette, etc. The interior and exterior of the building present the appearance of a hotel rather than that of a tenement or apartment house.

Depending upon their use, buildings are placed in nine separate classes by Section 448 of the Revised Municipal Code. A building used for hotel purposes is classified as a Class IIb building, while a tenement or apartment house is classified as a Class VI building. A combination apartment hotel, such as the proposed structure, is not placed in any particular classification, at least under that name.

The ordinance sets forth various requirements for the different classes of buildings as to construction, ventilation, etc. Section 650 provides that in tenement houses (Class VI buildings) every pantry, bath room, water closet, and urinal compartment must have a window opening on a street, alley,

yard, court, or vent shaft. But Section 470 provides that in buildings used for hotel purposes (Class IIb buildings) such rooms or compartments, in place of window, may be ventilated by an approved mechanical ventilating system.

Section 432 of The Chicago Municipal Code of 1922 requires that all plans for the construction of buildings shall, before permits are issued, be presented to your department for examination and approval as to the ventilation of rooms, etc. Apparently there are bath rooms and service pantries in the proposed apartment hotel building which according to the plans will have mechanical ventilation. And your request to be advised as to the proper classification of this apartment hotel is made, we take it, for the purpose of determining whether the ventilation facilities thereof are in accordance with the provisions of the ordinances.

Whether this type of building—a combination of a hotel and apartment house—was in the contemplation of the City Council at all when it originally enacted the ordinances appertaining to the ventilation requirements of the different classes of buildings may perhaps be questioned.

There is no doubt about the intent of the City Council regarding the classification of a building used for the purposes of a hotel. Neither is there any doubt where a building or portion of it is used as a tenement or apartment house. But the question of the classification of a building is not so clear where under one roof the characteristics of both uses are present and combined, one merging into the other, as in apartment hotels.

Apartment hotels are of comparatively recent development. They combine hotel service and features with certain apartment conveniences. They have the type of service customarily incident to hotels, including lounging rooms, public lobbies, maid service, central hotel telephone service, public dining rooms, hotel office, hotel layout on all the floors, etc. All furnishings, furniture, china, utensils, etc., are generally owned by the operators of the building. The effect and appearance of such buildings, both inside and outside, are

usually that of a hotel rather than that of an apartment or tenement house. As a matter of common knowledge such buildings are regarded both by the occupants of them and by the outside public in the nature of hotels rather than as apartment or tenement houses.

From a strictly legal standpoint, we are frank to say that the question of the classification of the proposed apartment hotel for the purpose of determining its proper ventilation requirements is not altogether free from doubt. On the one hand it is in the nature of a hotel. On the other hand it has certain apartment features.

However, our attention is called to the fact that many of these apartment hotels, similar in principle and in construction to the building to be erected at 201 East Delaware place, have in comparatively recent times been erected, including the following:

Belden.
Belmont.
Shore Acres.
Wellington Arms.
Graemere.
Jordans Building.
Southmoor.
Picadilly.

And we further understand that the above structures were classified by your department as Class IIb buildings, that is, as buildings used for hotel purposes, for the purpose of determining their ventilation requirements.

We are not prepared at this time to say that the construction your department has heretofore placed upon this matter in classifying these apartment hotels as Class IIb buildings for the purpose of determining their ventilation requirements was an erroneous one.

It may well be possible that if we were passing upon the classification of apartment hotels in the first instance as an entirely new question, we might have reached a different conclusion as to the classification of such structures than

has heretofore been given the matter by your department, but we cannot doubt at this time the propriety of our advising, in regard to the proposed apartment hotel, the construction heretofore given to similar cases by your department.

It would be different if the question were altogether clear and free from ambiguity, but your department having acquiesced in this construction for so long a time, and so many apartment hotels having been already erected under that interpretation, we feel it would be hardly proper for us to now suggest that a different interpretation be applied to the proposed apartment hotel to be erected at 201 East Delaware place.

If legal proceedings were instituted to compel the issuance of a permit for this particular building in accordance with the plans submitted, providing for mechanical ventilation of certain bath rooms and service pantries, we think we would find it exceedingly embarrassing in the courts to endeavor to sustain a different interpretation of the ordinances as applied to this particular building than has heretofore been adopted by your department in regard to similar apartment hotels.

We think it is not at all improbable that the court would take the position that, the matter being not free from ambiguity or doubt, the contemporaneous construction of the ordinance by your department would be controlling.

Where the execution of statutes is confided to a particular department of the government, the court will regard, and in doubtful cases adopt, the construction acted on by such department (*Mathews v. Shoro*, 24 Ill. 28; *Isaacs v. Steel*, 3 Scam. 97). And if the construction is doubtful, long continued action upon a particular construction may reduce the uncertainty to a fixed rule (*Comstock v. Cover*, 35 Ill. 470). The rules for the construction of an ordinance are the same as those applied in the construction of statutes (270 Ill. 87).

In view of what we have written above, it is our judgment that the plans of the proposed building should not be disapproved by your department in regard to the mechani-

cal ventilation system thereof, but that the said plans should be treated the same as other plans for similar apartment hotels have been heretofore treated by your department.

If in your judgment the construction of apartment hotels with approved mechanical ventilating systems for bath rooms and pantries is in any manner deleterious to the public health, then in our opinion it would be well for you to recommend to the City Council a classification of such buildings which will admit of no doubt as to the intent of the City Council in reference thereto, and which would clarify the situation.

Yours very truly,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Refund of Salary Deductions to Heirs of Deceased Policeman.

December 29, 1925.

RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

Confirming verbal opinion heretofore given at a recent meeting of the board concerning payment of a refund to the heirs of J. D. Roche, deceased policeman, the following is submitted:

Paragraph "E" of Section 39 of the Policemen's Annuity & Benefit Fund Act provides that refunds of salary deductions of deceased policemen, when payable, and when there is no child of such policeman, shall be payable to the

“heirs of such policemen according to the law pertaining to estates of deceased persons.”

In the case of J. D. Roche, it appears that an executrix of his estate was appointed and that he left a will leaving all his property to one Eleanor A. Roche, so that the refund cannot be paid to the executrix unless the executrix will agree to distribute the same among the heirs of said J. D. Roche, as shown by the table of heirship in said estate, and will give an indemnifying bond to protect the fund against error in such distribution or against failure to distribute. Otherwise, it will be necessary for the family to present to your Honorable Body a certified copy of the table of heirship as entered in the Probate Court of Cook County, together with the addresses of the heirs, and checks should thereupon be mailed to the respective heirs as shown in such table of heirship, in such amounts as each individual heir may be found to be entitled to be paid.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Liability of City for Payment for Cadillac Cars and Repairs.

December 29, 1925.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Your letter of recent date relating to the purchase of Cadillac cars and the making of repairs by the Cadillac Mo-

tor Car Co. during the year 1921 is at hand. You state that appropriations have been made from year to year for the payment of this debt, but that the reason it has not been paid is because no specific Council authority was given at the time the cars were ordered and the work was done. You ask whether the City is liable for the cost of the three cars and for the repairs thus made.

We have no information at hand which would indicate that the Cadillac Motor Car Co. acted otherwise than in good faith. Such being the case, the rule has been laid down by our Supreme Court that the liability attaches to the municipality even though the contract was irregularly entered into. The only questions to be decided are whether such contracts were within the powers of the municipality and whether the same have been fully performed and the benefits thereof have been received by the City. If that is the case, then the City is bound to pay for the benefits it has received according to the value of the goods or services rendered. It would not necessarily be bound by the letter of a contract so irregularly entered into, but it is liable on the *quantum meruit*, that is to say, the fair market value of materials and the usual and customary charges for services. (See *McGovern v. City of Chicago*, 281 Ill. 264.)

While not passing on the amount or the propriety of the charge, we beg to advise you that the City, having accepted the benefits of the contract, must pay what these were worth.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved :

FRANCIS X. BUSCH,

Corporation Counsel.

Owner's Right to Install His Own Street and Sidewalk Improvements in New Subdivision.

December 30, 1925.

HON. WILLIAM H. PONTOW, Alderman, 50th Ward.

Dear Sir :

We acknowledge receipt of your communication to this department dated December 22, 1925, in which you advise us that Mr. George Reinberg is the owner of the twenty-five acre tract of land at Devon and Kedzie avenues; that he desires to subdivide this parcel of property, dedicating the necessary streets to the City and also to construct thereon certain necessary improvements such as sewer, water, sidewalks and street paving; that all of these improvements are to be constructed entirely at his own expense; that you have taken this matter up with Mr. John J. Sloan, president of the Board of Local Improvements, requesting him to issue a permit permitting him to construct these proposed improvements by private contract, but that this request was refused.

You desire to be advised (1) as to what an owner is required to do to subdivide and to install his own improvements, and (2) what control the Board of Local Improvements has in connection with such owner's desire.

A municipal corporation is vested with the control of its streets within its corporate limits. Such control, however, is not exclusive, but is subject to the paramount power of the state (*Chicago and S. Traction Company v. Illinois Central Railroad Company*, 246 Ill. 146).

The City of Chicago, possessing this authority to control its streets, has passed certain ordinances dealing with the location, character and dimensions of streets and sidewalks (Chapter LXXVII, Sections 3687 to 3777), as well as ordinances providing for the mode of piercing or opening sewers

and drains, their form and size and the material to be used (Chapter XXV, Sections 1085 to 1103).

Consequently, in answer to your first question, our opinion is that the owner of the premises, having determined to subdivide his property and presumably having placed on record the plat of his subdivision—said plat consistent with the ordinances of the City and the regulations of the Map Department—must ascertain the requirements of the ordinances of the City in reference to the proposed improvements and comply with them. Upon a due showing of strict compliance of the contemplated improvements with the ordinances, the owner is entitled to receive from the Department of Streets and Alleys of the City the necessary permits to proceed with the work planned.

In reference to your second question as to what control the Board of Local Improvements has over an owner's desire to make improvements of the character heretofore discussed, it is necessary to state that although the City of Chicago possesses control of its streets, still since the streets are for the use of the entire public and not for Chicago's citizenry alone, the City's power is subject to the paramount power of the State. The legislature vested with this power of the State created a municipal agency to ascertain and determine preliminary questions in reference to proposed improvements to be paid for by assessment or taxation, or both, known as the Board of Local Improvements (*Givens v. City of Chicago*, 188 Ill. 348). Consequently, the Board of Local Improvements must, in all cases where the proposed improvement is to be paid for by taxation or assessment, submit to the City Council an ordinance for the proposed improvement with its recommendation and estimate.

In the instant case, however, the improvements are to be constructed entirely at the expense of the owner of the premises and not by assessment or taxation, and also in every regard, we understand, the proposed improvements are to comply with the ordinances of the City.

These being the facts, there is therefore in our opinion, no necessity to appear before the Board of Local Improve-

ments to receive its recommendation or sanction in connection with the proposed improvements upon Mr. Reinberg's parcel of land, nor has the Board of Local Improvements in a case such as the one before us, any control over the owner's desire to proceed with improvements, the entire expense of which the owner is to bear, and the said improvements to comply in all respects with the ordinances of the City.

Very truly yours,

BARNET HODES,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

**Power of Retirement Board to Collect Moneys Paid
Out by Trustees Under the Act of 1915, as
Amended.**

December 30, 1925.

RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

In response to the request made by your Honorable Body at a recent meeting for an opinion as to the power of your Honorable Body to collect moneys paid out by former police pension boards, and confirming verbal opinion heretofore given, the following is submitted.

I.

Under the provisions of the Police Pension Act of 1915, as amended in 1917, and pursuant to the construction placed upon the amendatory act of 1917 by the Supreme Court of Illinois in the case of *Beutel v. Foreman* (288 Ill. 106), no service pension could be validly or legally granted, or be paid, to any policeman under 50 years of age whose application for such pension was filed, or granted, subsequent

to March 1, 1917. All pensions so granted were invalid, and all pension payments made by reason of such grant of pension were made in error, and the moneys so paid remained the property of the Pension Fund and became a debt due and owing from the recipients thereof to the said fund, together with interest on said several payments.

II.

The amendatory act of 1917 required that any applicant for a pension less than 50 years of age, who had served twenty years upon the police force, should pay into the Pension Fund an amount equal to 5 per cent of his former policeman's salary from the date of his retirement until his attainment of the age of 50 years, before such applicant would become entitled to a pension.

Any policeman who retired after twenty years of service and while less than 50 years of age, subsequent to March 1, 1917, became obligated to pay into the Pension Fund the amount hereinabove referred to before becoming entitled to a pension.

Any retired policeman within this category who has not paid such amount into the Pension Fund should be required to pay the same before being paid any pension payments, together with interest on the several payments as they become due.

III.

As to the right of your Honorable Body to recover the moneys hereinabove referred to as having been paid in error, Section 50 of the Policemen's Annuity & Benefit Fund Act, in force July 1, 1921, provides as follows:

"It is the intention of this Act that the annuity and benefit fund herein provided for shall, on the first day in the month of January of the first year after the year in which this Act shall come in force and effect in such city, thereafter supersede and take the place of any police pension fund which shall be in operation in such city under and by virtue of" the Act of 1915.

The same section further provides, that all moneys, securities and other assets of the old Pension Fund shall be transferred to the Retirement Board of the Annuity & Benefit Fund on January 1, 1922.

Debts due and owing to the former Pension Fund were "assets" of that fund and those assets passed to the present fund, together with the moneys and securities, and became and are assets of this fund and subject to be dealt with by your Honorable Body.

Section 58 of the Policemen's Annuity & Benefit Fund Act, as amended by the act approved July 2, 1925, provides, among other things as follows:

"The retirement board may retain out of any future annuity, pension, or disability benefit payments such amount, or amounts, as it may in its discretion set for the purpose of repayment into the annuity and benefit fund herein provided for of any moneys paid to any annuitant, pensioner or disability beneficiary through misrepresentation, fraud or error."

IV.

I am of the opinion that your Honorable Body has the right to retain out of any future annuity, pension or disability benefit payment hereafter found to be due or payable, such amount as your Honorable Body may in its discretion set for the purpose of repayment into the Annuity and Benefit Fund of any moneys paid to any applicant for a pension to whom was granted any pension in violation of the amendatory Police Pension Act of 1917, with interest thereon, together with any amount found due from any such applicant as salary deduction payments not paid in accordance with the provisions of said amendatory act of 1917, with interest on such respective due payments.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Cancellation of Interim Certificates.

December 31, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

The writer has been asked by your Mr. Hildreth what disposition should be made with respect to bonds which are authorized but are sold to the treasurer on interim certificates which mature before the bonds are printed.

It is our understanding that in cases of this kind, where an interim certificate or substitute bond is used as evidence of the issuance of the bond, payments made from time to time are endorsed on the back thereof. This preserves a record which stands in lieu of the issuing of the bonds and the cancellation of same.

The question, as we understand it, is whether it is proper to have the record show such cancellation without the bonds ever having been executed in the shape of instruments that are transferable and merchantable.

Section 57 of The Chicago Municipal Code of 1922 contemplates a complete substitution of such interim certificate or substitute bond in lieu of the regular issue. We see no useful purpose in executing documents merely for the purpose of cancelling them, and we believe that the law will be sufficiently complied with if, upon final payment being made and endorsed on the interim certificate, the same is marked cancelled and a record preserved of it in lieu of the issuance and cancellation of the bonds themselves.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Automatic Sprinkler System in Class IIb Buildings of Ordinary Construction.

January 5, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

We have your communication of recent date in which inquiry is made of this office as to whether or not an automatic sprinkler system is required in a six-story and basement building of ordinary construction occupied as a Class IIb building erected prior to the passage of the fire prevention ordinances, Sections 1291 to 1297, inclusive, of The Chicago Municipal Code of 1922.

It is to be noted that in Section 1291 of said code specific reference is made to the effect that the installation of automatic sprinklers shall be required in buildings erected after the passage of said ordinance requiring such installation. We quote:

“Every building specified in Section 1297 (including Class IIb buildings) as requiring a sprinkler system, which shall be erected *after* the passage of this ordinance, shall be equipped with an approved automatic sprinkler system as hereinafter set forth * * *

Very plainly the City Council when passing this ordinance contemplated and intended reservations to be made with respect to existing buildings in this instance, and therefore it will not be possible for your department to require the installation of sprinklers in Class IIb buildings erected prior to the passage of the ordinance.

Very truly yours,

JAY A. SCHILLER,

Assistant Corporation Council.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

Opening of New Streets in the South Water Street Area.

January 9, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

Your communication addressed to the Corporation Counsel relating to the opening up of new streets between South Water and Lake streets, *i. e.*, Garland court, Holden court, Federal street and Fork avenue, has been referred to the undersigned for consideration and reply.

Specifically you enquire, (1) whether or not the City might erect buildings for municipal purposes over said new streets, leaving ample space on the surface for the passage of vehicles and foot passengers, and (2) if such use could be made of the streets in question either under the improvement ordinances as passed or by the adoption of appropriate amendments thereto.

Our Supreme Court has repeatedly held that the authority of municipalities over streets and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon the charter powers of the municipalities granted by the legislature. (*People ex rel. Mather v. Field & Co. et al.*, 266 Ill. 609, 617.)

The City of Chicago is a municipal corporation existing and operating under the provisions of an act entitled "An Act for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and amendments thereto. (Chapter 24 Revised Statutes of Ill.)

In and by Article V of the foregoing act the powers of the City Council are specifically set forth (Paragraph 65, Sections 1 to 100, inclusive), and bearing in mind the well known rule that the enumeration of certain powers excludes

such powers as are not enumerated, the question then remains as to whether or not a power not expressed but sought to be exercised can legitimately be inferred from the powers expressly granted. Implied powers are such as are necessary or indispensable to the exercise of powers expressly granted. The only power expressly given the City which has any relation to the subject of our inquiry appears to be the following: "Ninety-nine. To regulate the space over the streets, alleys and public places of the city, and upon payment of proper compensation, to be fixed by ordinance, may permit the use of such space more than twelve feet above the level of such streets, alleys or public places."

The foregoing apparently refers to temporary as distinguished from permanent use, and applies to signs, banners or projections or other objects of minor size affixed to buildings which would be subject to removal by order of the City Council or by revocation of the permit therefor by the Mayor. It would hardly be seriously contended that the City could erect a permanent building twelve feet over a street and extending from building line to building line thereon, for if such use of the space over a street could be held proper there would be nothing to prevent the entire loop district being solidly built up with buildings over all streets and all vehicular traffic relegated to the use of surface tunnels through such buildings.

A municipality is a mere agency of the state, and, whether invested with the fee or a mere easement in streets, it holds them in trust for the people of the state, who have an equal right to their use for street purposes and are represented not alone by the City but by the General Assembly. (*Chicago Railways Co. v. City of Chicago*, 292 Ill. 190; *Hepes Co. v. City of Chicago*, 260 Ill. 506.)

A city cannot devote a street or part thereof to private use.

People ex rel. v. City of Chicago et al., 193 Ill. 543.

Obstruction of street by public authorities is unlawful.

Guttery v. Glenn, 201 Ill. 275.

Permanent obstructions of public highways cannot be erected or authorized by the city.

Chic. Gen'l Ry. Co. v. C. B. & Q. R. R. Co., 181 Ill. 605.

Express power is conferred on cities and villages to regulate the use of their streets and to prevent obstructions and encroachments thereon.

City of Sullivan v. Best, 286 Ill. 315.

In discussing the question of what encroachments or obstructions upon the streets can be permitted by a municipality, our Supreme Court in the case of *The People v. Field & Co.*, 266 Ill. 609, at page 618, said:

“No absolute or iron-clad rule can be laid down with reference to what encroachments or obstructions upon the streets can be permitted by the municipality. The question, by the great weight of authority, always comes back to the point, are these obstructions or encroachments unreasonable and against the public interests? (3 McQuillin on Mun. Corporations, Sec. 1334.) The courts, in applying the rules of law to questions of this nature, should not permit the streets to be used in such a manner as to prejudice the rights of abutting owners while at the same time fully safeguarding all the rights of the public therein. These public rights do not depend upon the methods of travel recognized at the time the streets were opened or such public uses as have been sanctioned by long continued custom and acquiescence. The use of the streets must be extended to meet the new needs of locomotion, both above and below the surface of the ground. The public uses to which a city street may be applied cannot be limited by arbitrary rules, but must be extended to meet public wants and necessities occasioned by the enlarged uses to which the abutting property is devoted. (3 Dillon on Mun. Corp.—5th ed.—sec. 1155; *Molway v. City of Chicago*, 239 Ill. 486.) The right of the public in the city streets necessarily includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper.”

And continuing, at page 619, the court said:

“This court has stated that cities, in controlling and improving streets, are charged with the unquestioned

duty of preparing them for public use at such time and in such manner as the public necessities may require; that, holding the streets in trust for the public, the city authorities can not convey or divert them to other uses by granting to corporations or individuals rights or easements in the streets which interfere with the duty of preparing them for public use or to meet the public necessities; that in administering the trust the city cannot voluntarily place it beyond its power to discharge its duties therein. (*City of Quincy v. Jones*, 76 Ill. 231; *Matthiessen, etc., Zinc Co. v. City of LaSalle*, 117 id. 411.) In enforcing this rule it has been held that the city cannot deprive the property owners upon the streets, under the conditions there stated, of a sidewalk for the distance of half a mile (*Carter v. City of Chicago*, 57 Ill. 283); that where the streets are properly dedicated under the statute, they will be considered as designed for the purposes of travel or passage in any mode that does not tend to destroy their usefulness, but the municipality can not divert them to other uses or purposes (*City of Jacksonville v. Jacksonville Railway Co.*, 67 Ill. 540).''

The primary object of streets and highways being for passage and travel by the public, neither individuals nor abutting property owners on such streets or highways can be deprived of such use. Municipalities under the power of exclusive control and regulation of streets and highways may permit them to be used in any manner consistent with the public right of user thereof, but any special use must be subject to the rights of the public at large. Objects such as monuments, drinking fountains and stepping stones may be placed and maintained in streets and public highways where they do not materially interfere with general street purposes or the right of the public to travel or pass along on such street or highway.

A city cannot permit a private owner to build across an alley, at the second story of the building, a covered bridge or passageway, as that would deprive adjoining property owners of light and air, to which they are entitled.

Field et al. v. Barling et al., 149 Ill. 556.

A city cannot grant the right to lay railway tracks in a street without a petition of the property owners, as required by statute.

McGann v. People, 194 Ill. 526.

The owner of abutting property cannot be authorized to elevate his sidewalk for his private convenience, in order to use it as a platform for loading and unloading goods at his building.

Chic. Cold Storage Warehouse Co. v. People, 224 Ill. 287.

The following objects and obstructions in streets and highways have been approved by the courts:

A. Drinking fountains.

Levy v. City of Elizabeth, 79 N. J. L. 456.

B. Monument commemorating a public event.

Wallace v. Village of Canandaigua, 117 N. Y. S. 912.

C. A passageway from the platform of an elevated railway station to the second floor level of a department store.

Rothschild & Co. v. City of Chicago, 227 Ill. 205.

D. A soldiers' monument erected in a public square, on a mound 58 feet square and 4 feet high, upon which was placed a base and metallic figure 16 feet high.

Tompkins v. Hodgson, 2 Hun, 146.

E. Telegraph and telephone poles and wires.

Southern Bell Telephone Co. v. Francis, 109 Ala. 224.

F. Railroad tracks.

P. Ft. W. & C. R. R. Co. v. Reich, 101 Ill. 157, 172;
Ligare v. C. M. & N. R. R. Co., 166 Ill. 249.

G. Tunnels underneath the surface of the street connecting mercantile buildings on different sides thereof.

People v. Field & Co., 266 Ill. 609.

If the character of the structure or obstruction is such that it fairly constitutes an invasion of the street or highway and materially interferes with the public right of user of such street or highway for the purposes of travel, then such structures or obstructions are unlawful and may be abated as a public nuisance, or the property owner who is damaged thereby may maintain an action for the damages sustained by him by reason of such unlawful structure or obstruction.

The following are a few of the objects which have been held to be unlawful:

A. A band stand constructed of wood, about 13 feet square and 13 feet high.

Atterbury v. West, 139 Mo. App. 180, 184.

B. Booths where merchandise was sold and which were erected for use during a street fair.

Richmond v. Smith, 101 Va. 161.

C. A standpipe or water tower 15 feet in diameter and about 135 feet high, constructed of steel and having a capacity of 179,000 gallons.

Barrows v. City of Sycamore, 150 Ill. 588.

D. A water tank of substantial proportions, built upon a steel trestle work.

Davis v. City of Appleton, 109 Wis. 580.

E. Polling booths 25 feet long and about 10 feet wide.

Haberlil v. Boston, 190 Mass. 358.

F. Wooden shed occupied by vendors of merchandise.

St. John v. The Mayor, etc., of New York, 3 Bosw. 483.

The permanent occupation of a part of the surface of a street, even for a municipal purpose, is an unauthorized and illegal obstruction of the street.

City of Morrison v. Hinkson, 87 Ill. 587.

From a careful consideration of the principles of law enunciated in many adjudicated cases, some of which are hereinabove referred to, I am of the opinion that the City of Chicago has no right or authority to erect and maintain buildings for municipal purposes over or upon land dedicated or acquired for street purposes, and that the City could be enjoined from erecting such buildings, and, if erected, could be compelled to remove the same.

I come now to a consideration of the particular property that is the subject of our inquiry, *i. e.*, Garland court in the block between Michigan and Wabash avenues; Holden court in the block between Wabash avenue and State street; Federal street in the block between Clark and Dearborn streets, and Fork avenue in the block between Wells and Franklin streets.

On December 15, 1919, the City Council passed an ordinance relating to what is commonly referred to as the South Water Street Improvement, as follows:

“Section 1. That West South Water street be widened between West Lake street and North State street, that East South Water street be widened between North State street and North Wabash avenue, that River street be widened between North Wabash avenue and North Michigan avenue (as widened), *and that a north-and-south street be opened in the block lying between North Clark street, North Dearborn street, West South Water street and West Lake street*, by condemning therefor (subject to the provisions hereinafter stated, which excepts from each of the following described Lots, Blocks, Tracts and Parcels of Land to be condemned all portions of the same now subject to public use for wharfing or street purposes) the following described land, to-wit:”

Then follows the legal description of all property to be taken for said improvement. (Council Proceedings, Dec. 1, 1919, p. 1453; Dec. 15, 1919, p. 1576.)

A reference to the plat of the premises involved discloses that the above matter shown in italics refers to the prop-

erty to be condemned for the purpose of opening a street to be known as Federal street.

Condemnation proceedings were instituted in the Circuit Court of Cook County on November 11, 1920, to ascertain the just compensation to be awarded for the taking and damaging of property for the construction of the foregoing improvement. (See case No. B-68885 wherein City of Chicago was petitioner, and George B. Carpenter, *et al.*, were respondents.)

The foregoing case proceeded to final judgment on August 7, 1924. No appeal was prosecuted therefrom and the time for such appeal has long since expired. The judgment is therefore final and fixes the status of the new street known as Federal street as a public street or highway, to which the laws pertaining to public streets and highways are applicable.

On June 21, 1922, the City Council passed three ordinances, as follows:

First: For the opening and improvement of Fork avenue in the block bounded by West South Water street, North Wells street, West Lake street and North Franklin street, which said ordinance provides as follows:

“Section 1. That a local improvement shall be made within the City of Chicago, * * * as follows, to-wit:

Said local improvement shall consist of the *opening and improvement* of a north and south street hereby and herein named Fork avenue, in the block bounded by West South Water street, North Wells street, West Lake street and North Franklin street as hereinafter described.

That Fork avenue be opened by condemning therefor, the following Lots, Blocks, Tracts and Parcels of land, all of which are necessary for said purpose, to-wit.
* * * Provided that in the foregoing description of lots, * * * all portions heretofore taken for or devoted to street purposes are excluded.”

“A roadway of a width of forty-six (46) feet is hereby and herein established in said Fork avenue from the south line of West South Water street to the north

curb line of West Lake street, the center line of which shall be 134.61 feet east of the east line of North Franklin street measured on the south line of West South Water street and shall be 134.16 feet east of the east line of North Franklin street measured on the north line of West Lake street and shall be a straight line drawn through the aforesaid points to the north curb line of West Lake street.” * * *

Second: For widening and improvement of Garland court and improvement of Haddock place, all in the block bounded by East South Water street, North Michigan avenue, East Lake street and North Wabash avenue, which said ordinance provides as follows:

“Section 1. That a local improvement shall be made within the City of Chicago, * * * as follows, to-wit:

Said local improvement shall consist of the *widening and improvement* of a north and south street hereby and herein named Garland Court, * * * all in the block bounded by East South Water street, North Michigan avenue, East Lake street and North Wabash avenue, as hereinafter described.

That Garland Court be widened by condemning therefor, the following Lots, * * * all of which are necessary for said purpose, to-wit: * * * Provided that in the foregoing description of lots, * * * all portions heretofore taken for or devoted to street purposes are excluded.

“A roadway of a width of forty (40) feet is hereby and herein established in said Garland Court from the south line of East South Water street to the north curb line of East Lake street, the center of which shall be two hundred seventeen (217) feet east of the east line of North Wabash avenue, measured on the south line of East South Water street, and shall be two hundred sixteen and fifty-four one-hundredths (216.54) feet east of the east line of North Wabash avenue, measured on the north line of East Lake street, and shall be a straight line drawn through the aforesaid points to the north curb line of East Lake street.” * * *

Third: For opening and improvement of North Holden court and improvement of East Haddock place, in the block

bounded by East South Water street, North Wabash avenue, East Lake street and North State street, which said ordinance provides as follows:

“Section 1. That a local improvement shall be made within the City of Chicago, * * * as follows, to-wit:

The said local improvement shall consist of the *opening and improvement* of a north and south street hereby and herein named North Holden Court * * * all in the block bounded by East South Water street, North Wabash avenue, East Lake street and North State street as hereinafter described:

That North Holden Court be *opened* by condemning therefor the following Lots, * * * all of which are necessary for said purpose, to-wit: * * * Provided that in the foregoing description of lots, * * * all portions heretofore taken for or devoted to street purposes are excluded.”

“A roadway of a width of forty (40) feet is hereby and herein established in said North Holden Court from the south line of East South Water street to the north curb line of East Lake street, the center line of which shall be one hundred fifty-nine and thirty-three one-hundredths (159.33) feet from the east line of North State street measured on the south line of East South Water street and shall be one hundred fifty-nine and sixty-four one hundredths (159.64) feet east of the east line of North State street measured on the north line of East Lake street and shall be a straight line drawn through the aforesaid points to the north curb line of East Lake street.” * * * (Council proceedings, June 21, 1922, pp. 642-3.)

The above quoted ordinance relating to Garland court provides for the “widening and improvement” thereof. Garland court already exists at the place indicated. It is already devoted to public use for free and unobstructed passage thereon by all persons desiring to use it.

In the case of *Field et al. v. Barling et al.*, 149 Ill. 556, our Supreme Court at page 567 quotes with approval from the case of *Quincy v. Jones*, 76 Ill. 231, as follows:

“It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for

public use as streets, * * * as the public necessity may require. Holding them in trust for the public, and having no authority to convey or divert them to other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights for easements in the streets which might in any way interfere with the duty of preparing them for public use."

In view of the law as enunciated in the foregoing case and in the cases hereinbefore referred to, it is clear that the City had no power to divert the use of streets or public highways to uses other than street purposes.

The above quoted ordinances relating to Fork avenue and Holden court provide for "opening and improvement" of certain north and south streets as therein provided and the petition filed for condemnation of the necessary property to provide for such opening and improvement states that such opening and improvement is to be made for street purposes. Special assessment proceedings are now pending in the County Court with reference to the above named Fork avenue, Garland court and Holden court (see No. 49013, County Court, entitled "*City of Chicago v. Lowenmayer et al.*," *In re* Fork avenue; No. 49014, County Court, entitled "*City of Chicago v. Cunningham et al.*," *In re* Garland court; and No. 50719, County Court, entitled "*City of Chicago v. Atwater et al.*," *In re* Holden court.)

The foregoing proceedings were all instituted under the provisions of the Local Improvement Act of 1897 and amendments thereto, and said causes are now pending and undetermined. The petitions for condemnation have been filed in each case, also the report and assessment roll, and said causes are now pending for hearing.

In view of the specific language of the local improvement ordinances relating to Fork avenue and to Holden court, the City of Chicago, upon acquiring the property contemplated, will have no right or authority to use such property for other than street purposes. If it is desirable that this

property be condemned for municipal purposes other than street purposes it will be necessary to dismiss these proceedings and start all over again. If it is desirable that municipal buildings be erected on the premises in question and that the ground floor or surface be left open to be used for street purposes such property can only be acquired by the City by purchase or by condemnation and will have to be paid for by general taxation. The only part of such an improvement that could be paid for by special assessment would be sewers, drains, street paving, curbing and sidewalks, the cost of which would be an insignificant amount compared with the cost of acquiring the property involved. The question really narrows down to one of expediency, that is, whether or not the acquiring of the property in question is necessary or desirable for municipal purposes in view of the expense that will necessarily have to be incurred, and payment thereof to be provided for by general taxation.

By reason of the foregoing I am of the opinion:

First: That the City of Chicago has no power or authority to divert the streets or public highways to uses or purposes other than street purposes.

Second: That in condemning property for street purposes under the provisions of the Local Improvement Act the City is restricted, in its use of such property so acquired, to street purposes.

Third: That the only method by which the City can acquire the premises hereinbefore referred to for municipal purposes other than street purposes is by purchase or by condemnation under the provisions of the Eminent Domain Act.

Fourth: That the special assessment proceedings now pending for the acquiring of said premises for the opening and improvement of two streets to be known as Fork avenue and Holden court, respectively, as hereinbefore described, are not susceptible of amendment so as to provide

for other or different uses of the property therein sought to be condemned.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved :

EDMOND L. MULCAHY,

Acting Corporation Counsel.

Quitclaim Deed Where City Holds Tax Certificates.

January 9, 1925.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir :

The City Real Estate Agent has presented for approval a quitclaim deed to be signed by the Mayor and City Clerk wherein it is proposed to relinquish the claim of the City on account of two tax certificates which it holds, the same having been acquired by reason of delinquent special assessments.

Section 225 of the Revenue Act, in stating what the City may do as a result of purchase at a delinquent special assessment sale, seems to touch only that feature which was recently added that provides for a recording or registration of the certificate without taking out a deed. We do not believe that it was intended to curtail the City's right to issue a quitclaim deed where payment of its claim has been made in full. In order to make the deeds so given conform precisely to the wording of the statute, however, we recommend that after the wording "conveys and quitclaims to" there should follow the words "and sells and assigns to him the tax certificates owned by the grantor."

In the same way Section 56 of the Local Improvement Act, which gives authority to sell and assign the lien of the City, but authorizes the City to bring foreclosure proceedings, contemplates merely that an expeditious way of handling the situation may be provided.

We do not think that either of the sections mentioned should stand in the way of the City executing a quitclaim deed if it is desired and if the City's claims have been fully paid.

We therefore recommend that the quitclaim deed prepared in the case before us be signed the same as if the City had procured a tax deed in the particular instance.

Yours truly,

LEON HORNSTEIN,
Acting Corporation Counsel.

**Rights of Party Who Secured Building Permit Before
Change in Zoning Ordinance.**

January 12, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of December 10th and of January 8th enclosing a letter from Messrs. Ashcraft & Ashcraft, attorneys, and requesting the views of this department.

As we understand it, the facts are about as follows:

Your department on October 14, 1924, issued a permit No. A 96269 granting permission to erect certain brick stores at 3351 to 3359 Cottage Grove avenue. These premises at that time were in a commercial district, and the owner was lawfully entitled, under the terms of the Zoning Ordinance,

to erect the store building. Certain property owners filed a bill in chancery to restrain the erection of such store building and a temporary injunction was granted. Subsequently Judge Hebel of the Superior Court dismissed the bill for injunction for want of equity. Several months after you issued the building permit, the Zoning Ordinance was so amended as to place the premises in an apartment district.

“As a result,” you state, “of said legal proceedings, the applicant was unable to continue the work of the erection of said building.”

You wish to be advised whether the owner of these premises may be permitted to complete the erection of the building in accordance with the permit issued by your department.

In the letter from Ashcraft & Ashcraft, attorneys, which you enclose, they state as follows:

“This permit (for the stores) was subsequently revoked by ordinance of the City Council on December 23, 1924, and we call your attention to page 4337 Journal Proceedings of the City Council. Subsequently on February 13th, 1925, this property was zoned for residential purposes and we call your attention to the ordinance as printed on Page 4879 of Journal of the Proceedings of the City Council. We now understand that Mrs. Howe is proceeding with the erection of her buildings in accordance with the old permit which was cancelled.”

We do not understand it to be a fact that you ever revoked the permit which was issued in this case. Also Messrs. Ashcraft & Ashcraft are in error in their statement that the permit was “subsequently revoked by ordinance of the City Council on December 23, 1924.”

What the City Council did do upon that date was to pass not an ordinance but the following order:

“Ordered, that the Commissioner of Buildings be and he is hereby directed to withhold all building permits for construction or alterations at the premises known as Nos. 3351-3353 Cottage Grove avenue, and fur-

ther, it is directed that in the event any construction or alteration work is now in progress at these premises that same be stopped, pending the consideration of the amendments to the 'Zoning Ordinance' affecting these premises now pending before the Committee on Buildings and Zoning."

But, so far as we are informed, you took no action under said order, and properly so. Such an order cannot amend an ordinance or result in nullifying a permit lawfully granted in accordance with an existing ordinance and is of no force or effect as a matter of law. (See printed opinions of Corporation Counsel, April 16, 1923, to April 16, 1924, p. 278.)

The question presented in this case, in so far as we are advised, is not unlike in principle the question concerning which we advised you on June 8, 1925, in our opinion Number 979.

In that case a permit was issued by you in accord with the terms of the Zoning Ordinance to construct a two-story apartment building at 1518-1520 East 82d street. The Avalon Park Civic Association filed injunction proceedings thereafter to restrain the erection of the said apartment building. These injunction proceedings were found to be without merit, and the bill for injunction was dismissed for want of equity. Subsequently, but before the apartment building could be completed, the premises upon which it was proposed to construct it were zoned for residence purposes. In that case we advised you that, in our judgment, the completion of the building should not be interfered with by your department.

Where parties secure a permit to which they are legally entitled under the ordinances of the City for the construction of a certain type of building, do a substantial amount of work under that permit, and are prevented by matters beyond their control, such as injunction proceedings which are found to be without merit, from continuing with the work, we think that they should be allowed a reasonable time within which to complete the structure, not-

withstanding that the zoning regulations may be changed before its completion.

The communication from Ashcraft & Ashcraft, which you enclosed, is herewith returned.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

EDMOND L. MULCAHY,
Acting Corporation Counsel.

**Responsibility as Between Bureau of Maps or Fire
Commissioner for Sufficiency of Frontage
Consents for Filling Station.**

January 20, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of January 8th.

Section 2279 of The Chicago Municipal Code of 1922 requires that any person, firm or corporation desiring to install a tank for the storage of certain inflammable liquids shall first obtain a permit from your department, and provides for "written consents of the property owners representing the majority of the total frontage in feet of any lot lying wholly or in part within lines 150 feet distant from and parallel to the boundaries of the lot upon which said tank or tanks is or are to be installed."

You outline the procedure followed by your department in the issuance of permits for the installation of such tanks for gasoline stations, and request the views of this department upon certain questions in relation thereto.

The application for permit to install tanks is, you state, presented to you on the printed form of an application blank, a copy of which you enclose, marked "Exhibit A." This application (Exhibit A) is accompanied by the frontage consent petition required by the ordinances, a copy of which you enclose, marked "Exhibit B." Said frontage consent petition contains the following affidavit:

"State of Illinois }
County of Cook } ss

..... being first duly sworn, on oath deposes and says that he is the applicant in the above petition or the applicant's duly authorized agent; that he was present and saw the persons whose names are subscribed to the above petition sign the same, and that each and every of said persons, firms or corporations claimed that at the time of such signatures, they were the owners of the property described opposite their respective names in the above petition, or that they were the duly authorized agents of the owners, with full authority to sign and act for them. Affiant further says that the above frontage consents were signed on the dates enumerated and set opposite each name.

(Signature)
Residing at

"Subscribed and sworn to
this day of
192
.....

Notary Public.

(Notarial Seal)"

The frontage consent petition (Exhibit B) is sent by your department to the Bureau of Maps for verification, and the Bureau of Maps returns the petition to your department in the form of a letter containing its report as to the sufficiency of the petition, a copy of which you enclose, marked "Exhibit C."

Some of the questions presented by your communication have been passed upon heretofore by this department, and for that reason we will not go into unnecessary detail as to

the reasons for the conclusions we express in reference thereto, unless you should especially desire us to do so.

You wish, first, to be advised whose duty it is to see that signatures of property owners on the frontage consent petition are bona fide signatures. In answer to this question, would state that when a frontage consent petition is presented, containing signatures of property owners as well as the affidavit (as set out above) of the person who circulated the petition, which appears upon its face to be regular, you have the right to assume, unless objection is filed with you or the petition is questioned in some manner, that the petition is what it purports to be, and that the signatures of property owners which it bears are genuine. Such a petition is presumed to be genuine, and the burden is upon those who question it to show that it is not.

You state that a petition often contains signatures by an agent without any evidence on the petition or accompanying it of the authority of said agent to sign, and you wish to be advised whether such signatures should be counted. Such signatures should be counted by you as legal unless the agency is questioned in some manner. The authority of an agent to sign such a petition need not affirmatively appear. It is not necessary that the authority of an agent to sign such a petition should accompany the petition or appear upon the face of it, and the burden is upon the objectors to show that such authority did not exist. (211 Ill. 296, and cases there cited.)

You wish to be advised whether it is proper for your department to accept the report of the Bureau of Maps as to the sufficiency of the frontage consent petition, and whether your department or the Bureau of Maps is to be responsible for signatures within the 150 foot limitation fixed by the ordinance.

We have no doubt as to the propriety of your department accepting the report of the Bureau of Maps as to the sufficiency of a frontage consent petition. We do not understand that the Bureau of Maps undertakes to certify to

the genuineness of the signatures, but merely reports on the sufficiency of the petition, assuming that the signatures thereon are what they purport to be.

In making its computations, we understand that the Bureau of Maps interprets the provisions of the ordinance as requested by your department. That being the case, the question as to whether your department or the Bureau of Maps is responsible for signatures within the 150 feet limitation required by the ordinance would hardly be very material, inasmuch as there cannot now be very much doubt or much difference of opinion as to the meaning of the provisions of the ordinance.

You wish further to be advised whether, in considering what are proper frontage consents, the ruling should be to regard square feet area or street frontage?

You also state that in connection with the last question, it is a fact that by "subterfuge subdivision" triangular lots and corner lots, having two frontages, provide a wide difference of opinion and a very great discretionary power unless such frontage consents can be specifically defined.

We know of no theory upon which square feet area should be considered, but in all cases it is street frontage that controls. In an opinion of the Illinois Supreme Court (*The Standard Oil Company v. Kamradt*, 319 Ill. 51), recently published, we are given considerable light on the proper method of computing frontage consents. The ordinance involved in that case was the ordinance of Calumet City, but that ordinance is not different from ours so far as is concerned the principle of its interpretation.

That ordinance provided for "written consents of the property owners representing the majority of the total frontage in feet of any lot * * * lying wholly or in part within lines 200 feet distant from and parallel to boundaries of the lot * * * upon which said tank or tanks * * * are to be installed," while in our ordinance the limitation within which signatures must be secured is fixed at 150 feet.

The Supreme Court, in its decision in the above case, said:

“The term ‘frontage,’ unless a special meaning must be given it by reason of language in the particular ordinance, may be defined as the line of demarkation between private property and that open to the general use of the public, such as a street, stream or park. Where two sides of property face or abut upon streets, streams or parks it must be said to have frontage on both sides.

We are unable to find in this ordinance that which indicates a legislative intent contrary to the general usage of the language. Nor is there to be found in the purpose of the ordinance any such difference. While it is true that the owner of lot 22 in this case, fronting on Sibley street and State Line avenue, is more effective in giving or withholding his consent to the proposed oil station than is the owner of lot 21, fronting only on Sibley street, it cannot be said that damages from or depreciation of the property must be the same on both lots. A different number, character and type of buildings might be used on the lot fronting on two streets than can be placed on an adjacent inside lot. Moreover, such a lot is ordinarily more valuable and must bear more of the expense of a local improvement. Such a lot cannot be said to be similar to lots in the middle of the block or similarly affected by an oil station. There is therefore no reason apparent from the ordinance itself why the ordinary usage and definition of the language of the ordinance should not be applied. So applying it, we have no doubt as to its meaning. When the ordinance referred to the majority of the total frontage in feet, such frontage included frontage of corner lots abutting on both streets within the area prescribed by the ordinance.”

We note by the report of the Bureau of Maps, a copy of which you enclosed marked Exhibit C, that the Bureau of Maps at your request disregards the side frontage of corner lots within the 150 foot limitation. Such side frontage of corner lots should hereafter be included in accordance with the above opinion of the Supreme Court in estimating the frontage involved and the frontage required. We are enclosing herewith copy of the full opinion of the Supreme Court for your information.

There is just one suggestion we would like to make to you in reference to the form of the frontage consent petition, a copy of which you submitted to us, marked "Exhibit C." We think the frontage consent petition should contain over signatures of the property owners the following language:

"We, the undersigned property owners, hereby consent to the installation of tanks for the sale or storage of any of the liquids mentioned in Section 2277 of The Chicago Municipal Code of 1922 upon the lot or plot of ground legally described above."

If you should desire any further information in connection with any of the matters herein, we shall be very glad to have you let us know.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

Regulation of Business of Selling Oil Burning Apparatus.

January 21, 1926.

HON. JACOB M. ARVEY, Chairman, Judiciary Committee.

Dear Sir:

With your letter of the 26th inst. you transmitted to us a copy of the following proposed amendment to The Chicago Municipal Code of 1922, to be known as Section 2373A:

"2373A. EMERGENCY NIGHT SERVICE REQUIRED BY APPARATUS COMPANIES.) During the months of November, December, January, February and March, there shall be maintained an emergency repair service between the hours of 6:00 P. M. and 8:00 A. M. by the several individuals, firms, companies or corporations whose business in the City of Chicago is that of selling oil burning apparatus for heating purposes.

A sufficient fleet of repair trucks shall be made available to respond to the number of emergency calls as may be averaged in each preceding week.

This service may be maintained by means of a consolidated bureau comprising the several apparatus companies or may be individually operated by each person, firm, company or corporation doing business in the City. Failure to provide this emergency service will result in the rejection of any and all installations requiring approval of the Bureau of Fire Prevention in accordance with paragraph (j) of the preceding section."

You asked for our opinion whether said amendatory section would be valid and enforceable if duly passed by the City Council.

Municipal corporations possess only such powers as are expressly granted to them or necessarily implied. *Town of Drummer v. Cox*, 165 Ill. 648; *City of Chicago v. M. & M. Hotel Company*, 248 Ill. 264. Grants of power to municipalities are strictly construed and powers will be implied only where necessarily incident to powers expressly granted or to the existence of the municipality. *City of Chicago v. M. & M. Hotel Company*, *supra*; *Kiel v. City of Chicago*, 176 Ill. 137; *Gundling v. City of Chicago*, 176 Ill. 340.

The Cities and Villages Act contains no specific delegation of power to which the proposed amendatory section could be referred. Authority to enact the same must, therefore, be derived by implication from what are commonly known as the police powers of the City or such authority does not exist.

It may be assumed, we think, that the purpose of the proposed amendment is to provide for the protection of the public in respect to the danger of fires caused by defects in oil-burning apparatus used for heating purposes, or the protection of public health arising from cold and inclement weather if such oil-burning apparatus becomes suddenly inadequate or unserviceable where used for heating places of human habitation. No doubt adequate equipment and means in the hands of some one for prompt and efficient repair of

such apparatus would contribute to public protection in respect to the dangers named and others similar thereto.

The effect of the proposed amendment, however, is to impose upon certain persons or corporations the duty of providing at their own expense for public protection in respect to dangers not caused by them or incidental to the conduct of their businesses. There is nothing in the proposed amendment which suggests that all oil-burning apparatus used for heating purposes is necessarily dangerous when installed, or that the repairs to be made shall be in consequence of any negligence or default upon the part of those selling or installing the same. The dangers created by defective apparatus for which such repairs are to be furnished may have arisen from the conduct of the property owners themselves, from accident or misadventure or from purely natural causes.

Police ordinances to be valid must be promotive of the general good by preventing all persons from engaging in occupations or performing acts that endanger the public safety and welfare or by imposing upon all persons engaged in certain businesses the duty of conducting the same in such manner that the public safety shall not be endangered by the nature of the businesses themselves. The police power is limited to the enactment of laws demanded for the public health, safety or welfare of society. *Ruhstrat v. People*, 185 Ill. 133. To impose upon any class of persons the duty of providing protection for the public against dangers not due to the conduct of those upon whom such duty is imposed denies them the equal protection of the laws. *City of Chicago v. The Pennsylvania Company*, 252 Ill. 185.

We are of the opinion, therefore, that the proposed amendatory section would not be valid or enforceable if passed.

Very truly yours,

C. M. DOTY,

Approved: *Assistant Corporation Counsel.*

LEON HORNSTEIN,

Acting Corporation Counsel.

Annuity Rights of Children Born Out of Wedlock.

January 22, 1926.

MR. DONALD F. CAMPBELL, Actuary, Municipal Employees
Annuity and Benefit Fund.

Dear Sir:

Replying to your letter relative to annuity rights of children born out of wedlock, the following is submitted:

Your letter states that an employee, now deceased, was married December 31, 1921; that his widow is applying for widow's annuity; that she has a child born March 15, 1918, which she claims is the child of the deceased employee.

Your question is as to whether the child of an employee born before marriage is entitled to child's annuity if the parents afterwards intermarry. And, as a corollary to this, you inquire as to whether or not an illegitimate child of an employee is entitled to an annuity if the parents never intermarry.

I.

Section 15 of Chapter 17 of the Illinois statutes provides that if the mother of any bastard child and the reputed father shall, at any time after its birth, intermarry, the said child shall in all respects be deemed and held legitimate. This answers your first question.

II.

As to whether or not an illegitimate child of an employee is entitled to an annuity if the parents never intermarry, Section 45 of the Municipal Employees Annuity and Benefit Fund Act provides that a child's annuity shall be granted for the benefit of any child less than 18 years of age the *issue* of certain described municipal employees. If the

employee in question is a woman, it would seem that her child, being her *issue*, would be entitled to an annuity even though illegitimate. If the employee in question is a male, it is very doubtful as to the right of an illegitimate child to secure an annuity on the ground that such illegitimate child is the issue of such male employee. In the law, illegitimate children inherit from the mother but do not inherit from the reputed father. This for the reason that the motherhood of a child is capable of legal certainty in proof, whereas the fatherhood of the same child, in the absence of subsequent marriage, has no such certainty of proof. Where the paternal parentage of an illegitimate child has been established by a court proceeding not followed by a marriage of the parties, such court proceeding would at least tend to remove the doubt, if not legally establish the fact; but as to whether a child's annuity could be granted in a case where the mother and reputed father never married, I would suggest that a decision await the presentation of a case in issue, as each case presents its own facts.

Respectfully submitted,

GEORGE F. MULLIGAN,

Approved: *Assistant Corporation Counsel.*

EDMOND L. MULCAHY,

Acting Corporation Counsel.

Workmen's Compensation Deductions From Disability Benefits.

January 22, 1926.

RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Replying to your letter requesting an opinion in the matter of the workmen's compensation deductions from disability benefits, the following is submitted:

Your letter states that Mr. Harry B. Slagle, an arc light changer in the Department of Gas and Electricity, was injured while on duty on September 27, 1922, and received duty disability benefits up to December 28, 1925, at which time he returned to work; that he was on a pole cleaning a lamp when two automobiles collided and struck the pole, throwing him to the ground and injuring him; that he applied for duty disability benefits and his application was approved by your Honorable Body in due course; that in accordance with the provisions of the Municipal Employees Annuity and Benefit Fund Act, the benefits received from the Workmen's Compensation Bureau of the City of Chicago were deducted from the disability benefits during the entire time he received the same; that it now appears that Mr. Slagle had a damage suit against the owners of the automobiles and made a settlement in said suit in November, 1925; that the benefits received from the Workmen's Compensation Bureau of the City were refunded to the City in accordance with the Workmen's Compensation Act; that Mr. Slagle refuses to accept the last check sent him by your Honorable Body on the ground that you still continue to deduct the workmen's compensation benefits; and that he now requests that the amounts heretofore deducted from all prior payments on account of the workmen's compensation benefits be refunded to him.

Your inquiry is as to the right of an employee to a refund of deductions made as hereinabove stated.

I.

Section 48 of the Municipal Employees Annuity and Benefit Fund Act provides:

"If any municipal employee who shall be disabled shall receive any compensation from such city on account of such disability under and by virtue of the law known as the Workmen's Compensation Act the disability benefit herein provided for such municipal employee shall be reduced by any amount so received if such amount shall be less than the amount of such

benefit; and if the amount or amounts received as compensation exceed the amount of the disability benefit herein provided for such municipal employee, such municipal employee shall not receive any such disability benefit until a period of time during which such benefit payable at the rate herein stated would equal the amount of such compensation shall have expired. In calculating any such period of time, interest upon the amounts of money involved shall not be considered.”

II.

Section 29 of the Workmen’s Compensation Act provides that where an injury for which compensation is payable by the employer under the act was not proximately caused by the negligence of the employer or his employees, and was caused under circumstances creating a legal liability for damages in some person other than the employer to pay damages, and the injured employee recovers damages either by way of suit or settlement from such other person, then the injured employee shall pay back to his employer the amount of compensation paid to him by such employer.

The Workmen’s Compensation Act is separate and distinct from the Municipal Employees Annuity Benefit Fund Act, and excepting as the latter refers to it, has no binding effect upon the administration of the Municipal Employees Annuity and Benefit Fund.

III.

There is nothing in the Municipal Employees Annuity and Benefit Fund Act which authorizes or empowers your Honorable Body to pay to an injured employee the amount of duty disability which he would have received had deductions not been made for workmen’s compensation benefits paid to him.

The fact that the Workmen’s Compensation Act requires the injured employee to pay that compensation back to his employer does not in any way affect the administration of the Municipal Employees Annuity and Benefit Fund under the act creating the fund.

The Municipal Employees Annuity and Benefit Fund Act simply provides that workmen's compensation payments shall be deducted from duty disability benefits and that when that is done everything has been done that the law requires, authorizes or permits.

I V .

I am of the opinion that neither Mr. Slagle, nor any injured employee similarly situated, has any right to recover from the Municipal Employees Annuity and Benefit Fund the amount of deductions made from his duty disability benefits pursuant to Section 48 of the Municipal Employees Annuity and Benefit Fund Act.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

EDMOND L. MULCAHY,
Acting Corporation Counsel.

**Necessity of Civil Service Commission's Hearing
Charges Within Thirty Days of Time of
Filing Charges.**

January 22, 1926.

HON. WM. F. FOEHRINGER, Secretary, Civil Service Commission.

Dear Sir:

You ask for an opinion on the following stated proposition submitted to you by counsel in the case of a certain police officer pending before the commission, to wit:

"The Civil Service Act provides for trials within thirty days and suspensions of only thirty days. An

inspection of the Act will clearly indicate that the Commission was without jurisdiction in the matter."

The contention of counsel in their communication to you is that trials before the Civil Service Commission must be had within thirty days from the filing of the charges.

The same proposition was recently involved in a case before Judge Hugo Pam in the Superior Court, and the position taken by us in the following written brief was sustained by the court. We therefore present the brief as our opinion in the matter you present. The brief is as follows:

"But one point remains for the court's consideration in deciding the issue raised by the demurrer, namely:

"What effect, if any, has the following provision in Section 12 of the Civil Service Act on the power and procedure of the Civil Service Commission in the matter of 'removal' of a person from the classified civil service:

" 'Nothing in this act shall limit the power of any officer to "*suspend*" a subordinate for a reasonable period, not exceeding thirty days.' "

"It must be observed that there are two different subject-matters involved in this Section, namely: *Removal* and *Suspension*; that removal is within the sole power of the Commission according to the manner in the section outlined, while suspension is recognized as being within the power of any superior officer.

"That suspension does not affect the proceeding of the Commission for removal is decided by the court in this case:

Thomas v. City of Chicago, 273 Ill. 479.

"It was contended in that case that the provision in said Section 12 for suspension, as a part of that section, had to do only with disciplinary matter. The Court said (p. 483):

" 'The language of section 12 is explicit and unambiguous. It provides squarely that "nothing in this act shall limit the power of any officer to suspend a subordinate for a reasonable period, not exceeding thirty days." It is contended by counsel for the appellant that this provision only refers to suspensions for cause, as enumerated in that section, and was clearly inserted

for the purpose of enabling the head of a department to maintain necessary discipline and efficient service by temporarily suspending an employee pending an investigation of charges preferred against him or while his case was being considered. While, undoubtedly, the head of the department would necessarily have the power to suspend a subordinate for these causes if the head of a department were to have any control over such subordinate or anything to say about the management of his department, there are a great many causes, other than those given by counsel for appellant, which might make a suspension or lay-off of the employees of a department necessary. Can it reasonably be said, under the clear and explicit language of the statute, that the head of the department has not the power to lay off employees under him for periods of less than thirty days for lack of work, lack of funds or other good cause'?

"In other words the *Thomas* case holds that suspension by the head of the department is a matter entirely independent of the removal proceedings otherwise provided for in the same Section 12, and it cannot, therefore, affect such proceeding. The *Thomas* case was based wholly on the particular suspension provision, and did not involve any proceedings of the Commission.

"In the case at bar the suspension was by the Chief of Police, and is a matter entirely independent of the Commission's proceeding. The petitioner would have been entitled to reinstatement after 30 days of his suspension by the Chief of Police, notwithstanding the pending charges before the Commission. The Commission had not suspended him and had nothing to do with such suspension in its jurisdiction of the pending charges.

"Section 3 of Rule VI of the Commission has to do only with continuance applied for by civil service employees, and the condition provided for such continuance that, if such employee is in suspension, he must waive his right to salary during the time for which he secures continuance, if such continuance should run beyond the thirty day suspension period. This rule is merely a recognition of the limitation for which suspension may be made, and provides a waiver of the right the employee would otherwise have for his salary during a continuance procured by him.

“To us the contention is untenable that such suspension period of thirty days must be construed to limit the time within which removal proceedings must be disposed of, and especially that, if such proceedings should, perchance, go beyond such thirty days, the whole proceeding would be regarded as thereby vitiated.”

Very respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

EDMOND L. MULCAHY,
Acting Corporation Counsel.

Payment for Ordinary Disability Benefit.

January 25, 1926.

RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Replying to your request for an opinion as to when and how payment should be made to entitle an employee to ordinary disability payments, the following is submitted:

I.

Section 47 of the Municipal Employees Annuity and Benefit Fund Act provides that deductions shall be made for ordinary disability benefits from the first payment of salary or wages due and payable to a municipal employee beneficiary in the months of January and July of each year. This does not mean that deductions shall be made from only the *first* payroll of January or July, but from the first payroll on which an employee's name appears during those months irrespective of whether he is on the first actual payroll or any other payroll in those months.

II.

Section 47 further provides that if any municipal employee required to contribute for ordinary disability benefit purposes shall not appear on the payroll of the department in which he shall be employed during the months of January or July in any year, such municipal employee may retain his rights to ordinary disability benefit by paying an amount, equal to that which would have been deducted from his salary during any such month if his name had appeared on the payroll during such month, into the Annuity and Benefit Fund on or before the 10th day of the succeeding month, or the 9th day in the event the 10th falls on Sunday or a legal holiday.

Under this provision, if an employee has not made the payment during the months of January or July the payroll clerk would be justified in making the deduction from the pay or salary of such employee for the protection of such employee, if any salary was payable or to be paid to such employee for any period up to and including the 10th day of February or August of each year.

III.

If no deduction is made because of the name of the employee not being on any payroll covering the period from the 1st of January to the 10th of February, or on any payroll covering the period from the 1st of July to the 10th of August of any year, then it is the duty of the employee to make contributions himself within such period or periods in order to preserve his right to ordinary disability benefit, if he be one who is required to contribute for ordinary disability benefit purposes.

IV.

I am of the opinion that it is the duty of the payroll clerks to make the proper semi-annual deductions from the

first payroll on which may appear the name of any municipal employee required to contribute for ordinary disability benefit purposes covering the periods from January 1st to February 10th, and from July 1st to August 10th of each year; that if the name of such employee does not appear on any payroll covering the periods named, then it is the duty of the employee to pay the required amount into the fund; and that if the name of the employee in his certified capacity does not appear on any payroll covering the periods named, and the employee makes no payment of the required amounts during the periods named, then such employee loses his right to ordinary disability benefit, until such time as he complies with the provision of the act relative to reinstatement in the ordinary benefit class.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Computation of Deductions of Salaries in Pension Adjustment.

January 26, 1926.

THE RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Complying with your request for an opinion as to the proper method of computing deductions where there is a split way of arriving at the amount earned, the following is submitted:

Your letter states that an employee may work only part time during the semi-monthly periods and yet get in considerable excess payments in the way of overtime; that the timekeepers and payroll clerks are desirous of having a ruling to govern them in making deductions for annuity purposes.

I.

The Municipal Employees Annuity and Benefit Fund Act provides that deductions shall be made from each payment of salary for the purposes of the Municipal Employees Annuity and Benefit Fund.

Section 12 of the act defines "salary" as follows:

"Salary:—Annual salary; provided, that three thousand dollars (\$3,000.00) shall be the maximum amount of the annual salary of any municipal employee which shall be considered for any purpose under this Act. Any amount of annual salary in excess of said amount of three thousand dollars (\$3,000.00) which any municipal employee shall receive shall not be considered for any purpose under this Act."

II.

Section 40 (b) of the act provides as follows:

"For all purposes of this Act the following schedule shall be observed in computing the annual salary of any municipal employee whose salary or wages shall be arranged upon other than a yearly basis.

Monthly basis:—Annual salary shall be considered to be an amount equal to twelve (12) times the amount of the salary per month; provided, no amount of salary in excess of two hundred and fifty dollars (\$250.00) for services rendered in any one month shall be considered for any purpose of this Act.

Weekly basis:—Annual salary shall be considered to be an amount equal to fifty-two (52) times the amount of the salary per week; provided, no amount of salary in excess of fifty-seven dollars and fifty cents (\$57.50) for services rendered during any one week shall be considered for any purpose of this Act.

Daily basis:—Annual salary shall be considered to be an amount equal to three hundred (300) times the amount of the daily wage; provided, no amount of wages in excess of ten dollars (\$10.00) for services rendered during any one day shall be considered for any purpose of this Act.

Hourly basis:—Annual salary shall be considered to be an amount equal to twenty-four hundred (2400) times the amount of the hourly wage; provided, no amount of wages in excess of one dollar and twenty-five cents (\$1.25) for services rendered during any one hour shall be considered for any purpose of this Act."

III.

It is quite evident that it is the intention of the act that deductions for the purposes of the fund shall be made from any and all compensation received by an employee beneficiary of the act, whenever and however earned, until the maximum amount of the salary, considered for annuity purposes, payable to him at any payment period, shall be reached, whether such salary be on a monthly, weekly, daily or hourly basis.

For instance: An employee on a daily basis of \$8 per day shall have deductions made from the full amount payable to him at any payroll period at a rate not to exceed \$8 per day for the period of time covered by the payroll, without regard to the amount earned in any one day of such payroll period; the reason for this being, that the law provides that deductions shall be made from "each salary payment" and not from the daily earnings. In other words, the number of days for which he is being paid shall be multiplied by \$8 and the product of such multiplication shall be the maximum sum from which deductions can be made, provided, however, that such maximum sum shall not exceed one-twelfth of the annual salary of such municipal employee on a monthly payroll, nor exceed one-twenty-fourth of the annual salary of such municipal employee on a semi-monthly payroll.

I V.

The provision in Section 41 of the act to the effect that no overtime or extra service shall be included in computing the term of service of any municipal employee refers to "time" and not to "money," to "service" and not to "deductions" or "contributions."

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Advancement of Money to Committee of Citizens for
Reapportionment Campaign.**

January 27, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Under date of January 4th you wrote to the Corporation Counsel asking whether the City has power to make an appropriation for the purpose of aiding a committee of citizens in the present campaign for legislative re-apportionment. Accompanying your letter was a copy of communication from Messrs. Edward E. Gore, George Hull Porter and Charles A. McDonald, representing the committee in question, the gist of which was that the committee asked for the sum of \$10,000, that it needed the money now, that it should be provided for in the Annual Appropriation Bill about to be passed, and that reimbursement would be made to the City by the committee on or before July 1, 1926.

Word was conveyed to you to the effect that this could not legally be done, and since then the Annual Appropriation Bill has been passed without carrying such an appropriation. Hence, this letter is principally a matter of completing the record and for guidance in the future.

While the proper apportionment of the State is of great consequence to the City as a municipality, it is not in a technical sense such a municipal purpose as the City would be authorized to appropriate funds for. It is more to be regarded as a matter concerning the people of the municipality than the municipality as a corporation. Such being the case, we would have to find some direct authority in the charter to expend money for such purposes. There are, of course, many activities of the City which are carried on for the individuals comprising the community as distinguished from the municipality, such as health measures, preservation of the peace, etc. But in each case there is express authority granted by the charter for such activity.

In addition to the above, it would be quite an extraordinary procedure for the City to make an advancement of the kind proposed. It would amount to making a loan. There is no authority under the law for making a loan of this kind. If there were to be any appropriation it would have to be on the basis of an appropriation authorized for corporate purposes, which is not possible in this instance.

We are therefore constrained to hold that the proposed advancement would not be authorized by law.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Sale of Blank Cartridges Under Hardware Store License.

January 27, 1926.

HON. JOHN E. PTACEK, Deputy Superintendent of Police.

Dear Sir:

You requested on January 18, 1926, an opinion as to whether or not an ordinance passed March 21, 1923, entitled "An Ordinance for the Licensing and Regulation of Retail Hardware Stores" can be construed as giving the possessor of a retail hardware store license, issued under the terms and by authority of the said ordinance, the privilege of selling or offering for sale that commodity known as blank cartridges.

The ordinance in question amends Chapter XLIX of The Chicago Municipal Code of 1922 by adding Article XVIII thereto. Section 1, Paragraph 1 of the ordinance, or Section 2617A of the code as amended reads as follows:

"RETAIL HARDWARE STORES DEFINED. The term 'retail hardware store' as used in this article shall be construed to mean any building, room, enclosure, premises, place, establishment or part of any establishment, in the City of Chicago operated, maintained or conducted for the sale or offering or keeping for sale at retail of any hardware, tinware, aluminum ware, enamel ware, cutlery, tools, implements, apparatus, machinery, plumbing, engineers', janitors', blacksmiths', contractors' or electrical supplies; gas, plumbing or electrical fixtures or other articles or wares made largely of metals; kerosene, rifles, shotguns and *loaded shot gun shells or cartridges*, when not more than 25,000 are kept on hand at one time, provided, however, that dealers or establishments or parts of establishments of a similar nature specifically defined and licensed by ordinance of the City of Chicago and licensed factories and work shops in the City of Chicago selling only their own

products shall be exempt from the provisions of this article.”

Section 1, paragraph 5 of the ordinance or Section 2617E of the code, as amended, provides for the grading of retail hardware stores according to the number of persons engaged in such stores and for each grade, and then recites:

“Provided, however, that the minimum fee for establishments selling, offering for sale or desiring to sell rifles, shotguns and *loaded cartridges and shells*, where not more than 25,000 shells or cartridges are kept on hand at one time shall be twenty-five dollars (\$25.00), and provided that no such license for any retail hardware store shall include or cover the right or privilege of selling deadly weapons as defined in Section 1255, or gun powder as defined in Section 1426 of The Chicago Municipal Code of 1922.”

These two paragraphs contain the only reference to cartridges found in the ordinance.

Section 1243 of The Chicago Municipal Code of 1922 is as follows:

“1243. PROHIBITIONS. No person, firm or corporation shall sell, offer for sale, loan or give away to any retail dealer, consumer or user located within the city any toy pistol, toy gun, toy cannon, *blank cartridge*, firecracker exceeding two inches in length and one-quarter of one inch in diameter, torpedo exceeding three-fourths of an inch in diameter, any substance consisting of chlorate of potash and sulphur, or any device for discharging or exploding such substance by concussion, and no person, firm or corporation shall sell, offer for sale, loan or give away to any retail dealers, consumer or user located within the city firecrackers of any size, or fireworks, which contain any explosive more powerful than black gunpowder.”

If the Retail Hardware Store Ordinance is to give licensees under it the privilege of selling blank cartridges, it has to operate as an implied repeal of Section 1243 of the code. Implied repeals are not favored by law and the courts have repeatedly held them to exist only where there is a

clear repugnance in the terms of two legislative acts, where the enforcement of the two acts would result in endless strife and confusion, and where the terms of the two indicate an intention on the part of the legislative body enacting the same that the latter act should operate as a repeal of the former. When such a condition exists the courts hold that the latter act operates as a repeal of the former in so far as the terms of the two are repugnant.

The Retail Hardware Store Ordinance makes two specific mentions of "loaded shells and cartridges" and one of "loaded cartridges and shells"; Section 1243 of the code specifically prohibits the sale of blank cartridges.

A careful examination of the terms of the two ordinances reveals, in our minds, no repugnance in their terms and certainly none which would warrant us to hold that the Retail Hardware Store Ordinance repeals that part of Section 1243 of the code which prohibits the sale of blank cartridges. We believe and it is our opinion that wherever the term "cartridges" is used in the Retail Hardware Store Ordinance, the intention of the City Council was to refer to loaded cartridges only; and that in Section 1243 there can be no doubt as to the meaning of the term "blank cartridge."

Hence it is our opinion that the Retail Hardware Store Ordinance gives a licensee thereunder no privilege of selling blank cartridges, and that Section 1243 of the code is in full force and effect as heretofore.

Yours truly,

WILLIAM J. TUOHY,
JAMES J. COUGHLIN,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

**Proposed Ordinance Requiring Play Ground Space in
New Subdivisions Ten Acres
or More in Size.**

January 27, 1926.

HON. JACOB M. ARVEY, Chairman, City Council Committee
on Judiciary.

Dear Sir:

Your letter of recent date in which you request an opinion as to the power of the City Council or of the State Legislature to pass legislation to provide "that any tract of land of ten acres or more in area, when subdivided into lots of less than one acre each in size, shall not be platted or accepted by the City, unless in such new subdivisions adequate reservations are made for such public play ground and school sites as the City may deem necessary," has been referred to the undersigned for consideration and reply.

In the year 1921 our legislature passed an act effective July 1, 1921, authorizing the creation of plan commissions in cities, villages and incorporated towns (Smith-Hurd Revised Statutes of Illinois, 1923, Chapter 24, Paragraph 71, Page 228). Section 1 of said act vests plan commissions, extant at the time of its enactment and which have been recognized by the council in any city, with all the powers thereby conferred upon plan commissions created pursuant to said act. Section 2 of said act provides that any such commission, among other things, may prepare and recommend to the City Council for adoption a comprehensive plan of public improvements, which plan, after its adoption by the council, shall be known as the official plan of such city. Said Section 2 further provides that

"Such plan may include reasonable requirements in reference to streets, alleys and public grounds in un-

subdivided lands within the corporate limits and in contiguous territory outside of and distant not more than one and one-half miles from such limits, and not included in any city, village or incorporated town, such requirements to be effective whenever such lands shall be subdivided after the adoption of such plan."

Section 3 of said act provides as follows:

"No map or plat of any subdivision presented for record, affecting land within the corporate limits of any city, village or incorporated town, which has adopted heretofore or shall adopt hereafter an official plan in the manner prescribed in this Act, or in contiguous territory outside of and distant not more than one and one-half miles from such limits and not included in any city, village or incorporated town, shall be entitled to record or shall be valid unless the subdivision thereon shown, shall provide for streets, alleys and public grounds in conformity with any requirements applicable thereto of such official plan."

Thus, by the foregoing act, the legislature has attempted to vest the City Council with the power to provide, among other things, for the acquisition of public grounds in unsubdivided lands. Clearly, if this act be constitutional, the City of Chicago could accomplish your purpose by pursuing the course outlined in said act. Therefore the question presents itself: Is the Plan Commission Act in so far as it relates to the creation of public grounds in unsubdivided lands, a valid enactment? In considering this question the following constitutional and statutory provisions should be born in mind:

1. Article XIV of the amendments to the Constitution of the United States, Smith-Hurd Revised Statutes of Illinois, 1923, page XXI, provides, among other things, as follows:

"* * *; nor shall any State deprive any person of
* * * property, without due process of law,
* * *."

2. Section 13 of Article II of the Constitution of Illinois (1870), Smith-Hurd Revised Statutes of Illinois (1923), page XL, reads as follows:

“Private property shall not be taken or damaged for public use without just compensation. Such compensation, when not made by the state, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without consent of the owners thereof, shall remain in such owners subject to the use for which it is taken.”

3. Section 1 of the Eminent Domain Act, Smith-Hurd Revised Statutes of Illinois (1923), Chapter 47, page 953, reads as follows:

“That private property shall not be taken or damaged for public use without just compensation; and that in all cases in which compensation is not made by the state in its corporate capacity, said compensation shall be ascertained by a jury, as hereinafter prescribed.”

In the case of *City of Chicago v. Wells*, reported in Volume 236 Illinois, at page 129, our Supreme Court had before it for consideration the question of the right of the owner of lands to make a subdivision thereof. At page 132 the court says:

“Section 2 of the Bill of Rights provides that no person shall be deprived of property without due process of law, and under that provision no person can be deprived of property by legislative act or ordinance. The ordinance in question does not deprive appellant of her land, but it does deprive her of her control and dominion over it. In *Austin on Jurisprudence* (Vol. 2, p. 817), property is defined as follows: ‘Taken with its strict sense it denotes a right—indefinite in point of user, unrestricted in point of disposition and unlimited in point of duration,—over a determinate thing.’ In *Rigney v. City of Chicago*, 102 Ill. 64, the court said (p. 77): ‘Property, in its appropriate sense, means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others,

and doubtless this is substantially the sense in which it is used in the constitution.' In *Braceville Coal Co. v. People*, 147 Ill. 66, the same definition of property is adopted as follows: 'Property, in its broader sense, is not the physical thing which may be the subject of ownership, but is the right of dominion, possession and power of disposition which may be acquired over it.' The right of dominion, possession and power of disposition over a tract of land includes the right of an owner to subdivide it in such a way as he sees fit or to leave it unsubdivided. That is the principle upon which *People v. Cook*, *supra*, was decided, where it was held that an owner may use his own pleasure and best judgment in subdividing his land or refusing to subdivide it, and that a municipality cannot dictate to him how he shall subdivide his land or that he shall subdivide it at all. * * * The constitution, which stands for and expresses the will of the people, prohibits an interference with rights of property by legislative enactment, and denies to the legislature the power to provide that a municipality may subdivide the property of an owner without his consent, for any purpose whatever."

It is obvious that the creation and acquisition of public grounds in the manner outlined in the Plan Commission Act constitutes a taking of private property for public use and that under the foregoing constitutional provisions such a taking is not permissible unless the owner be compensated. The Plan Commission Act contains no provision for such compensation.

For the foregoing reasons I am of the opinion that the proposal "that any tract of land of ten acres or more in area, when subdivided into lots of less than one acre each in size, shall not be platted or accepted by the City, unless in new subdivisions adequate reservations are made for such play ground and school sites as the City may deem necessary," goes farther even than is justified by the statute and the constitution, and that there is serious doubt as to the constitutionality of the Plan Commission Act.

I am also of the opinion that the City of Chicago cannot require an owner of unsubdivided lands to make dedi-

cation of a portion thereof for public play ground and school sites as a condition precedent to the exercise of his right to subdivide such lands.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

I concur in the foregoing opinion.

W. ARNOLD AMBERG,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Subletting of Portion of Contract by Board of Local Improvements.

February 2, 1926.

HON. EDWARD J. GLACKIN, Secretary Board of Local Improvements. .

Dear Sir:

In your letter of recent date you state that there was submitted for approval a voucher of the Mid-Continent Construction Company, under its contract No. 14 for the construction of the superstructure of Sections 10 and 11 of the South Water Street Improvement, containing extra items for work not called for by this contract. You say further that you are informed that the work in question was included in a contract of the Great Lakes Dredge & Dock Co., and that it was the intention to cancel that portion of this company's contract and have the work done by the Mid-Continent Construction Company and paid for as extras in the latter company's contract. You ask several questions

in this connection which we will take up in the order you have propounded them.

Your first question is whether the Board of Local Improvements has authority to cancel a portion of a contract and have the work done by another contractor, and, if so, whether it would not be necessary under such circumstances to advertise before letting such portion of the contract if the amount involved exceeded \$500.

There is no such thing as canceling a contract legally entered into (or a portion of same) except under the terms thereof without rendering the person attempting to cancel it liable. There are exceptions in extraordinary cases of this general rule, but we need not consider them here, as these would not affect the questions before us. Provision may be made in the contract itself, however, for cancellation, and such provision may be followed out as thus agreed upon.

In the case of contracts of the Board of Local Improvements, in the form generally used, the right is reserved to cancel the whole or any uncompleted portion of the contract in case of default, and in such case to re-let the same or such portion of same as is not completed. While under the rule announced in *City of Chicago v. Hanreddy*, 211 Ill. 24, the proper procedure in case of default would be to re-advertise the uncompleted portion of the contract and let it to the lowest responsible bidder, yet this is a matter to some extent in the discretion of the board, and if there is an emergency or if there is any other good reason for letting it without advertising, it would not be beyond the power of the board, under the express terms of the contract, to re-let without advertising and charge any loss occasioned thereby to the original contractor. We assume that there was a good reason in the present instance for re-letting without advertising and that otherwise it would not have been done.

Your next question is whether it was correct to pay for the uncompleted portion of the contract as extras to the Mid-

Continent Construction Company before the contract with the Great Lakes Dredge and Dock Company was cancelled. In answer to that we beg to advise you that some action either looking to the cancellation of the original contract or an understanding with the original contractor should be had. Otherwise there would be great danger of claims and litigation arising therefrom. That is to say, if the contractor was not satisfied to let a portion of his contract go to other parties and had not agreed to that, if no notice of default and cancellation was given, such contractor might set up a claim for damages by reason of having the contract taken away from him. You have not informed us concerning the circumstances under which this shift was made and therefore we are not able to go farther than to state this general proposition of law.

Your last question is whether it would not have been more proper for the Great Lakes Dredge and Dock Company to itself sublet the contract and reimburse the sub-contractor rather than for the Board of Local Improvements to cancel the contract for a portion of the work and re-let the same. This question is partly answered by what we stated above. That is to say, that the board has no power to cancel the contract except for default. If there was such default, the proper procedure would have been to notify the contractor that it was in default and that a portion of the contract would be relet. On the other hand, if the contractor was willing to relinquish a portion of the contract and was willing to let the Board of Local Improvements take care of such subletting, an arrangement could readily been made with it and the surety on its bond whereby a portion of the work could be sublet to another contractor.

Inasmuch as you stated in your letter that the work had already been done by the new contractor and that the voucher submitted for approval covered the work, we assume that there must have been a complete understanding between the board and the two contractors; otherwise such a transac-

tion would not have gone through without protest on the part of the original contractor.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Award to Be Granted to Widows of Policemen Who
Were Pensioners Prior to July 1, 1921, and Who
Died Subsequent to That Date.**

February 3, 1926.

RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

Replying to your letter of January 27, 1926, requesting an opinion as to the amount of award to be granted to a woman whose husband was a pensioner prior to July 1, 1921, and who died subsequent to that date, the following is submitted:

Your letter was accompanied by a statement to the effect that Mrs. Alice Grimley made inquiry relative to the correctness of the amount of her pension; that she is the widow of John Grimley, who resigned April 11, 1913, and who received a pension of \$55 per month under the Act of 1887, as amended, until the date of his death, which occurred on August 26, 1921; that Mrs. Grimley was granted a pension under the Act of 1917 in the amount of \$50 for herself and \$5 for her child until the child's right expired on September 1, 1923.

I.

The question as to what law fixes the amount of the pension award of the widow of a pensioner has always been a close question, viz., whether it is fixed by the law in effect when her husband went on pension or by the law in effect at the time her husband died.

The Policemen's Annuity and Benefit Fund Act became effective July 1, 1921, and the pension rights of widows of certain described policemen who were on pension on that date are referred to in Section 50 of the Act of 1921, which provides that the widows of policemen "who are or shall become pensioners under and by virtue of the Act of 1915, as subsequently amended, and who shall die," shall have a right to receive pensions in accordance with the provisions of the Act of 1915, as amended. Nothing is said in the Act of 1921 relative to the widows of policemen who were pensioners under any act prior to 1915.

The Police Pension Act of 1915 provides in Section 12 thereof, that all persons who upon the taking effect of the act, are entitled to or receiving pensions under the Act of 1887, as amended, shall receive no further payments under the Act of 1887, but shall be entitled to the benefits provided for in the Act of 1915, excepting that the pensions granted and the amounts thereof shall not be affected.

While the Act of 1915 preserved the rights of former-law pensioners, it made no provision as to what pensions were to be paid to the *widows of such pensioners when such pensioners should die*.

II.

There is no question as to the amount of pension to be paid to a widow of a policeman who was retired on pension after July 1, 1915, since the Act of 1915, amended in 1917, makes provision for such widow, and the rights of such widow are preserved in the present Act of 1921.

The inchoate rights of a widow of a policeman who was given a pension under the Act of 1877, as amended, or under the Act of 1887, as amended, were apparently not preserved in the Act of 1915, and would, therefore, evidently depend upon the provisions of the Acts of 1877, as amended, and of 1887, as amended, respectively.

We have heretofore held that the pensions of certain widows were to be computed in accordance with the law in force at the time their respective husbands went on pension, on the ground that there was nothing in any subsequent legislation which took away from pensioners' widows the allotment of pension provided for them in the laws which were in effect when their respective husbands went on pension, or which otherwise specifically provided for such widows.

III.

On the other hand, the wife of a pensioner has no fixed right in any pension allotment under any pension law in existence prior to July 1, 1921, but has only an expectancy which ripens into a right when she becomes a widow. The wife of a pensioner who was given a pension under the Act of 1877, as amended, or under the Act of 1887, as amended, not having any fixed pension right but only an expectancy should apparently therefore have the amount of pension award as a widow fixed in accordance with the legal pension status of the husband at the time of his death, *i. e.*, under the law by virtue of which her husband was being paid his pension. How is that status to be ascertained?

IV.

The Act of 1887, in Section 12 thereof, contains a provision to the effect that members of the police force who, at the time of the taking effect of the Act of 1887, shall be entitled to receive any benefit under the Act of 1877, as amended, should receive no payments or benefits under the Act of 1877, as amended, but should in lieu thereof, be entitled to the benefits provided for in the Act of 1887. The Act of 1915

contains a provision in Section 12 thereof, to the effect that all persons entitled to or receiving pensions under the Act of 1887, as subsequently amended, shall receive no further payments under the Act of 1887, but shall in lieu thereof be entitled to the benefits provided for in the Act of 1915.

It was the evident intention of the legislature, that, upon the passage of the Act of 1887, all pension provisions of the Act of 1877, as amended, should be superseded by the pension provisions of the Act of 1887 (*Pecoy v. City*, 265 Ill. 78); that pensioners receiving pensions under the provisions of the Act of 1877 should thereafter be considered as pensioners receiving benefits under the Act of 1887; and that their legal pension status thereby became that of being pensioners under the Act of 1887.

It is also very apparent that it was the intention of the legislature that upon the passage of the Act of 1915, all pension provisions of the Act of 1887, as amended, should be superseded by the pension provisions of the Act of 1915 (*People v. Foreman*, 296 Ill. 487); that pensioners receiving pensions under the provisions of the Act of 1887 should thereafter be considered as pensioners receiving benefits under the Act of 1915; and that their legal pension status thereby became that of being pensioners under the Act of 1915.

This construction has the advantage of carrying as pensioners of each later act all those who were pensioners under any former act, and of giving to the widows of such pensioners the same rights as were given to the widows of those actually awarded pensions for the first time after the coming into force and effect of such later act. This construction places all widows on the same basis, when taken in conjunction with the specific provision contained in Section 5 of the amendatory act of 1917, to the effect that from and after the going into effect of the Act of 1917, the pensions to be paid to any pensioner or widow then receiving a pension or entitled thereto should not be less than \$600 per annum. There was an apparent effort on the part of the legislature to equal-

ize pensions; and the above interpretation of the Act of 1887 and the Act of 1915 is in harmony with such effort. It also definitely fixes the legal pension status of all old-law pensioners as being that of pensioners under the Act of 1915, as amended.

V.

Upon the basis of this reasoning all pensioners who were in receipt of pensions or were entitled to pensions prior to July 1, 1921, become properly classifiable as "policemen who are or who should become pensioners under and by virtue" of the Act of 1915, as amended.

It would necessarily follow, then, that the widows of such pensioners, according to Section 50 of the present act, have a right to receive pensions "in accordance with the provisions of the Act of 1915, as subsequently amended." This seems both logical and equitable, as it tends to equalize pensions of widows by having the rights of all old-law pensioners' widows adjudicated under one and the same act.

The basis of reasoning in the former opinions, hereinabove referred to, justifies the awards therein recommended to be made if widows are to be pensioned in accordance with the law in effect when their husbands went on pension. However, it seems to me that the better reasoning and more equitable course is that the awards to be granted to widows of all pensioners who were given pensions prior to July 1, 1921, and who died subsequent to that date, should be computed in accordance with the Act of 1915, as amended in 1917, rather than under the law in effect when their respective husbands retired on pension.

VI.

In view of the fact that either method of grant can be justified under the pension laws as they existed prior to the present act, I would recommend that the pensions heretofore granted to widows under the provisions of the Act of 1877, as amended, or of the Act of 1887, as amended, be permitted

to remain as granted; and that all future grants of pensions to widows of the class hereinabove referred to, be made under the provisions of the Act of 1915, as amended in 1917. No injustice will be done in such future grants, even though the amount of the pension be less than it might be if granted under some different construction of the law, because such pension is a gratuity in any event.

VII.

I am of the opinion that the pension of Mrs. Grimley was properly allowed under the Act of 1915 as amended in 1917.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Negotiability of City Warrants.

February 3, 1926.

HON. JOHN A. CERVENKA, City Treasurer.

Dear Sir:

In reply to your verbal request for an opinion as to whether the warrants issued by the Comptroller on the City Treasurer, and which are handled and passed from one to another practically the same as checks are to be regarded as negotiable instruments and subject to the same laws as govern negotiable instruments, we submit the following:

There are a number of decisions of the courts of this State that were rendered prior to the passage of the Uniform Negotiable Instrument Act, which hold in the most positive

way that such warrants are not to be regarded as negotiable instruments. Thus, it was held in the case of *People ex rel. Hurd v. Johnson*, 100 Illinois 537, at page 546:

“We regard the rule well settled, by considerations of public policy as well as by a decided preponderance of authority, that warrants or orders drawn by one municipal officer upon another, in the disbursement of the funds of the municipality and payment of its indebtedness, are not to be regarded as negotiable or commercial paper, cutting off equities against the corporation. As we have already seen, the official agents of these municipalities have no implied power to execute such paper, and to clothe these warrants or orders with the qualities and attributes of commercial securities would be to give them a character foreign to the object and purposes of their creation. *Hewitt v. Normal School District*, 94 Ill. 528.”

The rule announced in the above case was adhered to constantly by the Supreme Court, and the case just mentioned was cited and quoted from approvingly in the case of *Morrison v. Austin State Bank*, 213 Ill. 472. The latter decision was rendered in 1905, and is the last one that we find in our state where this subject is treated in an opinion, although there are references to the *Johnson* case in Appellate Court decisions of more recent date.

We mention the above dates, because the Uniform Negotiable Instrument Act was passed in 1907, and the only question that can be raised is whether the new act makes any change in the legal significance or status of such warrants. We do not believe that there is any such change, and this, it would seem to us, must be clear from the wording of the act itself, regardless of any court rulings thereon.

Although the new act specifies with great particularity what constitutes a negotiable instrument, we find nothing therein which is a radical departure from the usage as to such instruments under the law merchant. The official agents of the municipality are still in the position of having no implied power to execute commercial paper, just as they were when the *Johnson* opinion was rendered. Therefore, the rule

announced in the *Johnson* case, from which we have quoted, still applies, in our opinion, to the warrants that are now drawn. The instrument drawn by the Comptroller is still one whereby an officer of a municipality is drawing against another officer of the same municipality for convenience and not as independent drawer and drawee. It does not constitute such an obligation as is evidenced by an instrument like a bond, which is issued by the municipality itself.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Police Department Garage Under Roosevelt Road
Viaduct.**

February 5, 1926.

HON. MORGAN A. COLLINS, Superintendent of Police.

Dear Sir:

In reply to your inquiry of January 22, 1926, concerning the propriety of setting out the space under the Roosevelt Road viaduct for use as a garage in connection with the new Police building on State street, we are disposed to confirm the advice already furnished you by the Superintendent of Maps. The space under the viaduct is a public highway and, accordingly, subject to the common easement of passage and travel and the right of ingress and egress of abutters. These rights are property rights and cannot be extinguished except by vacation and subsequent condemnation. The Vacation Act provides that when a street or alley is vacated the lot lines of the abutters on either side thereof

shall extend to the center line of the space so vacated, and the title to such vacated land thereupon vests automatically in such abutters.

If, by negotiation with the abutters, however, they can be induced to quitclaim to the City the space referred to in the event of vacation, and thus vest title to the land in question in the City unburdened of the rights and easements of the public or abutters, we know of no reason why this may not be done. It might also very well be that the abutters' rights of access can be preserved and a portion of the space vacated and quitclaimed to the City so that your purpose may still be accomplished. There are a variety of methods by which the City could acquire the space for the purpose you mention, but they are all dependent upon the will of the abutters. It can do no harm to ascertain their disposition in this regard.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Federal Government Rights Over Street Where It Owns Property on Both Sides Thereof.

February 5, 1926.

HON. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

Your recent communication to the Corporation Counsel wherein you state "I am advised that there is an old state law wherein, if the Federal Government gets possession of

property on both sides of a street, the ownership passes to the government," and request a verification thereof, has been referred to the undersigned for consideration and reply.

In the year 1871 the Legislature of the State of Illinois passed an act entitled, "An Act to cede jurisdiction to the United States over certain land, and for the purchase and condemnation thereof," approved and in force December 14, 1871. Laws of 1871-2, page 551; Illinois Revised Statutes, 1923 (Cahill), Chapter 143.

In and by Section 1 of said act it is provided:

"That the United States shall have power to purchase or condemn, in the manner prescribed by law, upon making just compensation therefor, any land in the State of Illinois required for custom-houses, arsenals, light houses, national cemeteries, or for other purposes of the government of the United States."

Section 2 of said act provides that any land so acquired shall be held by the United States Government, exempt from all state, county and municipal taxation.

Owing to the disastrous results of the Chicago fire in October, 1871, the foregoing act was passed with an emergency clause and became effective from and after its passage.

On March 7, 1872, the following amendment to said act was passed, and became effective July 1, 1872:

"Sec. 4. That in case there shall be any street or alley running through any block or tract of land so purchased or acquired by the said United States for any of the purposes described in the said Act hereinbefore set forth, all that portion of such street or alley within such block or tract of land, shall, upon the purchase of the same by the United States, or the transfer of the same to the United States by condemnation or otherwise, for any of the purposes aforesaid, be and the same is hereby vacated and closed, and the lots or tracts of land abutting upon any such street or alley shall extend to the center line thereof, and vest in the said United States, and become the property thereof, with full right, power and authority to use, occupy and enjoy the same as its own property in fee, to the same extent as though the same had never been used or occu-

pied as a street or alley; and the said Act, to which this is an amendment, shall apply to the said portion of such street or alley so vacated to the same extent as to the block or tract of land so purchased or to be purchased or condemned for any of the purposes aforesaid."

The foregoing act remains unrepealed and in full force and effect.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Operation of Radio Through Loud Speaker in Thickly Populated Neighborhood.

February 9, 1926.

HON. SAMUEL E. PINCUS, Prosecuting Attorney.

Dear Sir:

Your inquiry of recent date addressed to the Corporation Counsel, requesting an opinion as to "whether the operation of a radio through a loud speaker in a thickly populated neighborhood to the disturbance and annoyance of the people, comes within Section 2655 of the code, commonly known as 'disorderly conduct,'" has been referred to the undersigned for consideration and reply.

Section 2655 of The Chicago Municipal Code of 1922 provides:

"All persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace, or diversion tending to a breach of the peace, within the limits of the city * * * shall be deemed guilty of disorderly conduct, and upon conviction thereof, shall be severally subject to a fine of not

less than one dollar nor more than two hundred dollars for each offense."

Section 56, Paragraph 143, Chapter 38, Illinois Revised Statutes (Cahill), 1925, provides:

"Whoever wilfully disturbs the peace and quiet of any neighborhood or family, by loud or unusual noises,
* * * shall be fined not exceeding one hundred dollars."

The disturbance of one person in her home alone has been held to be a disturbance of the neighborhood under a similar statute of 1845, Chapter 30, Section 112 (*Noe v. People*, 39 Ill. 96).

A charivari party is a violation of the above section of the statute (*Gilmore v. Fuller*, 198 Ill. 130; revg. 99 Ill. App. 272).

A complaint under Section 2012 of the Code of 1911 (which is the same as Section 2655 of the Code of 1922), charging that defendant "did make, aid, countenance and assist in making an improper noise, riot, disturbance, breach of the peace and diversion tending to a breach of the peace," charges a single offense only, and is not a blanket complaint.

City of Chicago v. Smith, 195 Ill. App. 349.

In and by Section 65, Article V, Chapter 24, Illinois Revised Statutes (Cahill), 1925, it is provided that the City Council shall have power,

"Seventy-second. To prevent, and suppress * * * noises, disturbances, disorderly assemblies in public or private places.

* * * * *

"Seventy-fifth. To declare what shall be a nuisance, and to abate the same; and to impose fines upon parties who may create, continue or suffer nuisances to exist."

There are some things which in their nature are nuisances, which the law recognizes as such. There are others which may or may not be so, their character depending on circumstances. In the latter instance it is manifestly beyond the power of a city to declare in advance that those things

are nuisances. The question, when a thing may or may not be a nuisance, must be settled as one of fact and not of law.

Village of Des Plaines v. Poyer, 123 Ill. 348.

Bushnell v. C. B. & Q. R. R. Co., 259 Ill. 391.

People v. City of Chicago, 260 Ill. 150.

People v. City of Chicago, 280 Ill. 576.

Other authorities define a nuisance as follows:

“A nuisance is anything that works or causes injury, damage, hurt, inconvenience, annoyance or discomfort to one in the legitimate enjoyment of his reasonable rights of person or property,” and “may exist not only by reason of doing an act, but also by omitting to perform a duty.”

Joyce on Nuisances, p. 2.

North Shore Street Ry. Co. v. Payne, 192 Ill. 239.

3 Blackstone's Comm. 215.

Funk & Wagnalls New Standard Dictionary defines a nuisance as “that which annoys, vexes, or irritates; something offensive or troublesome; an annoyance; a source of annoyance, harm or trouble; anything that by its use or by its permitted existence works annoyance, harm, inconvenience, or damage to another.”

The ordinance and statute first above quoted are, in my opinion, broad enough in their terms to justify the abatement of the annoyance in question, if, under the facts, any improper or unusual noise exists. This presents a question of fact, and consideration should be given the volume of sound, the location and time of night, the population and physical surroundings. Prosecutions may be instituted either by filing an information in the name of the People under the statute, or by complaint on behalf of the City of Chicago under the ordinance.

Respectfully submitted,

ROY S. GASKILL,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Claim of Quarantine Officer Who Sought Reinstatement.

February 10, 1926.

HON. ROSS A. WOODHULL, Chairman, Finance Committee.

Dear Sir:

This claim is for salary from July 1, 1925, to July 19, 1925, both inclusive, which the claimant contends she was wrongfully deprived of by reason of the failure and refusal of the Health Department to reinstate her to her position of quarantine officer on July 1, 1925, when she demanded reinstatement.

The facts disclosed by the statement of claim and the correspondence pertaining thereto, which includes the statement of the Commissioner of Health, are that on August 25, 1924, Miss Pettit was granted a leave of absence from her civil service position of quarantine officer. That on September 4, 1924, she was placed on the ordinary disability benefit of the Municipal Employees' Annuity and Benefit Fund of Chicago. That, after an examination and report by the physician of the Retirement Board that her disability benefit be discontinued, the board directed that she be carried until June 30, 1925, and then returned to active duty.

On July 1, 1925, Miss Pettit reported to the office of the Commissioner of Health and asked that she be reinstated to her position of quarantine officer. The Commissioner of Health refused to reinstate her to that position, but offered to appoint her to the position of health inspector, basing such official action on the following provision of the Annual Appropriation Ordinance of 1925:

“Bureau of Inspection:

Health Inspectors, in accordance with the following salary schedule: \$1880.00 for the first year of service, \$2000.00 for the second year of service, and \$2120.00 per

annum thereafter, shall be employed in all positions of food inspector, sanitary inspector and quarantine officer, which are now or may hereafter become vacant."

Miss Pettit refused to accept the tender of appointment to the new position in lieu of her old position, and on each working day after her report for reinstatement, to and including July 19, 1925, she appeared at the Health Department and requested permission to work in her position as quarantine officer. Up to that date there existed two vacancies in the position of quarantine officer, except as the above Appropriation Ordinance provision may have had the legal effect of abolishing the position. On July 20, 1925, the Health Commissioner reinstated Miss Pettit to her former position of quarantine officer. It must be observed here that if the claimant could be legally reinstated on July 20, 1925, then she was wrongfully denied reinstatement on July 1, 1925. The action of the Commissioner of Health of itself, however, cannot legalize the reinstatement nor determine the validity of this claim.

Miss Pettit's right to reinstatement is governed first by Section 4 of Rule VIII of the Civil Service Commission, which reads as follows:

"Sec. 4. HOLDING POSITION OPEN. Upon the expiration of a leave of absence, an officer or employee shall report to the head of his department and be reinstated in his position, unless the position in the meantime has been filled by certification from an eligible register, then he shall be reinstated only when a vacancy in a position of the same branch, class, grade or rank and character of work and approximate salary exists, and in order of his seniority of certification."

In addition to the foregoing rule of the commission there is the provision of the Municipal Employees' Annuity and Benefit Fund Act, which affects the claim. That provision is Section 47, as follows:

"When the disability of any such Municipal employee shall cease the said Retirement Board shall discontinue payment of Ordinary Disability Benefit to such

Municipal employee and such Municipal employee shall be returned to active service as a Municipal employee."

It seems clear that under the above rule of the Civil Service Commission, the claimant was entitled to reinstatement on July 1, 1925, because her position as quarantine officer had not "been filled by certification from an eligible register." That position not having been filled by certification, she was also entitled, under Section 47, *supra*, of the Municipal Employees' Benefit Fund Act, to "be returned to active service as a Municipal employee."

There remained to be determined what effect, if any, the said provision of the 1925 Appropriation Ordinance has upon the right of claimant to such reinstatement. It already appears to have been the intention of the City Council to abolish the positions of quarantine officers in every case where a vacancy existed and where such position should thereafter become vacant. The question therefore resolves itself into whether or not there existed a vacancy in the claimant's position within the meaning of the Appropriation Ordinance. We think there was not such vacancy and that therefore the ordinance provision does not apply to Miss Pettit's case.

Section 4 of the Civil Service Act empowers the Civil Service Commission to "make rules to carry out the provisions of this act," and such rules therefore have the full force and effect of law. It is expressly provided by Section 4 of Rule VIII, above set out, for "holding position open" in the case of a civil service employee who is granted a leave of absence and for reinstating such employee, *unless certification of another has been made from an eligible register to fill such position*. There was therefore no vacancy in claimant's position, and since the ordinance provision applies only to vacancies it does not affect claimant's right to reinstatement to her position as quarantine officer nor her right to the salary for the time for which she was wrongfully refused permission to serve in her position.

In your communication to us you state

"The question naturally arises as to whether the department under these circumstances should have kept

the position of quarantine officer vacant, pending the return to service of Lessie Pettit, also whether under the paragraph set up in the appropriation ordinance concerning health inspectors, quarantine officers, etc., the department was required to fill such vacancies from the eligible list of health inspectors."

The answer to both these questions is that the Commissioner of Health had no discretion in the matter of filling such positions, but as a matter of duty under the law should have made requisition on the Civil Service Commission for the certification of eligibles, and thereupon filled such position by appointment. If such position became vacant after the taking effect of the 1925 Appropriation Ordinance the certification of eligibles and appointments should have been made from "the eligible list of health inspectors." If a vacancy existed in the position of quarantine officer or health inspector a civil service employee entitled thereto might, by the action of mandamus, have compelled the Civil Service Commission to make proper certification from the eligible list and the Commissioner of Health to make the appointment to fill such vacancy.

People ex rel. Roderick v. City of Chicago, 283 Ill. 462.

People ex rel. v. Kipley, 171 Ill. 42.

Your communication states further that the

"Question also arises as to whether, under circumstances similar to those of Lessie Pettit, where an individual has been on the disability roll and is later returned to duty but whose position in the meantime has been abolished, the individual has any rights."

Under Section 4 of Rule VIII of the commission the employee in such case would have been entitled to reinstatement to the eligible list for later certification and appointment; and by virtue of the 1925 Appropriation Ordinance provision, which created the position of health inspector in lieu of the abolished position of quarantine officer, the reinstatement would have been upon the eligible list of health inspectors.

Because Section 3 of Rule VIII of the commission expressly authorizes the granting of leave of absence for a period of one year; because the claimant's leave of absence was due to disability for which she was until July 1, 1925, carried on the disability roll under the Municipal Employees' Annuity and Benefit Fund Act; because she was entitled under this act to be restored to active duty as a municipal employee, and was entitled, under Section 4 of Rule VIII, to reinstatement to the position of quarantine inspector in the absence of any certification of another to that position or the position of health inspector; and because the Appropriation Ordinance of 1925 does not operate under the facts to abolish the claimant's position;—for these reasons and in view of the fact that the Commissioner of Health has since reinstated claimant to her former position as quarantine officer in which she has since served, we are of the opinion that claimant is entitled to the salary for the time she was wrongfully prevented from filling the position.

Very respectfully submitted,

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Examination for Position of Chief Janitor of City Hall.

February 13, 1926.

HON. DORSEY R. CROWE, Alderman, 42d Ward.

Dear Sir:

Your communication addressed to the Corporation Counsel requesting an opinion as to whether the contemplated civil service examination of applicants for the position of chief janitor of the City Hall should be an original or a

promotional examination, has been referred to the undersigned for consideration and reply.

In the classification of civil service adopted May 21, 1920, in force June 1, 1920, as amended December 31, 1924, the following positions appear in Grade 5 of Branch II:

Grade 5: Major positions.

Chief Janitor (City Hall)

Custodian of Building (Library)

* * * * *

In Grade 4: Principal positions, there are the following:

Elevator starter,

Foreman of Repairs (Police)

In Grade 3: Senior positions, there are the following:

Chief Janitor (Bd. of Ed.)

* * * * *

Janitor and caretaker (Council chambers)

Janitor in charge of night force.

In Grade 2: Junior positions, there are the following:

Branch Janitor (Library)

Janitor.

The specific duties of a chief janitor are supervision of all work in the buildings; make up payrolls; make requisitions for supplies needed; checks material delivered at building and vouchers bills.

The foregoing classification and the rules of the commission were promulgated in accordance with Section 4 of the Civil Service Law. Section 9 of said law provides that the commission shall provide by its rules for promotions in the classified service, and shall provide, in all cases where it is practicable, that vacancies shall be filled by promotion; that examinations for promotion shall be competitive among such members of the next lower rank as desire to submit themselves to such examination.

Section 5 of Rule 1 of the civil service rules provides that "the recognition of rank shall take precedence over grade," and said section further provides:

“The Commission shall define rank for examinations and appointments in its official notices of examinations and in the minutes of its proceedings and shall determine in each instance the distinction between ranks, the necessity for examination from rank to rank and eligibility thereto.”

Section 2 of Rule 5 of said rules provides:

“The Commission in its notices of examinations shall define lines of eligibility for promotion, specifying by title of position the particular rank or grade entitled to take such promotion examination. Promotion examinations shall be held when the next lower rank, whether in the same or a lower grade, as determined by the Commission, contains two or more eligible persons desirous of taking examination. * * * No persons shall be eligible for promotion from a position in any rank or grade to fill a vacancy in the next higher rank unless the position in which he is employed at the time of examination is in the same branch and class of service as the position to be filled. * * *”

Under the foregoing rules a question of fact is presented for the determination of the commission at the time of calling an examination.

Promotions are properly made from rank to rank in the same line of work, to a higher salaried position from the next lower salaried position in the same line of employment. The question of whether or not a promotional examination is practicable or impracticable under the Civil Service Law and the rules of the commission, must be determined in the first instance by the commission, and “practicable” in this connection has been held by the courts to mean “possible.” The action of the commission, however, is subject to review in an appropriate legal proceeding (*People v. Errant*, 229 Ill. 66).

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Appropriation for Salaries of Sick or Disabled Firemen.

February 17, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

Your two separate communications of date, January 13th last, have to do with the same general subject-matter, viz., what to do with sick and disabled firemen in respect to their pay from salary appropriation or disability and pension fund. But one opinion is called for, and we shall consider first the general law and ordinance provisions affecting such cases.

You refer to Section 1199 of The Municipal Code of 1922, and indicate that this section has been either misunderstood or misapplied. We quote the section:

“1199. DISABILITY—SALARY. Any member of the fire department receiving any injury or becoming disabled while in the discharge of his duties and by reason of or as a consequence of the performance of such duties, so as to prevent him from attending to his duties as such member of the fire department, shall for the space of twelve months, provided his disability shall last that time, or for such portion of twelve months as such disability shall continue, receive his usual salary.”

Only such fireman “*receiving any injury or becoming disabled while in the discharge of his duties and by reason of or as a consequence of the performance of such duties, so as to prevent him from attending his duties*” is entitled to draw his regular salary for the time of his disability, not to exceed a year. And Section 1200 provides that:

“The fact of the existence of such disability and its duration shall be certified to by the city physician or by the production of such other evidence as shall be satisfactory to the fire commissioner.”

There is no warrant whatever under this Section 1199 for carrying any fireman on the regular payroll whose disability does not arise out of "the discharge of his duties and by reason of or as a consequence of the performance of such duties." It is not, therefore, so much a question of law, but rather a question of fact under this section, to be determined by the Fire Commissioner upon the certificate of the City physician or other evidence satisfactory to him, whether regular salary should be paid to the disabled fireman or not.

If the fireman's disability does not arise out of or is not caused by his discharge of duty, then his case is governed by Section 9 of the Firemen's Pension Fund Act (Cahill's Ill. S. 1923, Par. 950, p. 497), which provides that:

"If any fireman of any such city while in active service or on leave of absence shall become and be so physically or mentally disabled as to render necessary his retirement from active service, said board (of trustees) shall order the retirement of such disabled fireman and he shall be paid a monthly pension equal to one-half the amount of salary attached to the rank which he may have held in such service at the date of his retirement * * *."

Whether any fireman in a given case comes within the provisions of this section also presents a question of fact.

Two classes of disabled firemen are recognized, one by the ordinance to whom regular salary must be paid, the other by the Pension Act to whom no salary may be paid, but in lieu thereof must be paid the pension provided for.

There should be no difficulty in determining to which class of cases a disabled fireman belongs. In your communication but a single case is presented of a fireman who is entitled to draw regular salary, that of Charles M. Ragnett, fireman, Engine Co. No. 16. In no other instance does it appear that the fireman became disabled on account of the discharge of his duty or while actually engaged in the discharge of fireman's duty. Therefore all the firemen mentioned in your communication except Charles M. Ragnett are governed alone by the Pension Fund Act, and by Section 9 thereof it be-

comes the duty of the Board of Trustees to order the retirement of such firemen as have become so physically and mentally disabled as to render necessary their retirement from active service.

Section 1199 of the City's Code of 1922 has no application to any of the cases submitted by you. And any new ordinance provisions such as you suggest are in contemplation, can be construed and applied only after passage. We believe therefore that our opinion as already expressed is quite sufficient to meet the cases submitted by you at this time (see Opinions of Corporation Counsel, Francis X. Busch, 1924-1925, p. 564, date December 9, 1924).

FRANCIS J. VURPILLAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Operators in Firemen's Pension Fund.

February 19, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

In your letter of recent date, to which you attached a communication signed by the Fire Marshal, the Deputy Fire Marshal and one of the division fire marshals, you called attention to the fact that there is still some controversy concerning the status of operators in the Fire Department with respect to the Firemen's Pension Fund. You state that it appears to be a question of classification for the Civil Service Commission, and you ask that the Corporation Counsel should either direct the Civil Service Commission to change its classification or advise the firemen that the position taken

by them in regard to the exclusion of operators from the Pension Fund is incorrect.

In the communication attached to your letter the three fire marshals, who apparently represent the officers and uniformed men of that department, state that in 1917 a committee was appointed by the officers and firemen of the Fire Department to draft a new pension bill, and that Joseph E. Grossman was retained by the committee for that purpose. They state further that "it was the intention of the committee to eliminate in their new bill all civilian employees, but to give full protection to all those civilians who were enjoying the benefits and paid their money into such fund for their protection."

At a later time Mr. Grossman was employed to present the case of these same officers and firemen to the court on the theory that the Civil Service Commission had misconstrued the act. It would seem from this that it was probably the intention to eliminate from the beneficiaries of the Pension Fund all those who were not in the uniformed rank of the Fire Department. We do not believe, however, that the act itself will admit of such a construction. Section 13 states what persons are to be included as firemen within the terms of that act, and from that we gather that all persons who have been or shall hereafter be appointed to any position which is classified by the Civil Service Commission as in the fire service are to be included therein. The act also includes other persons who, prior to the adoption of the same, had contributed to the Firemen's Pension Fund then existing.

It will be seen from this that the entire control of the matter is vested in the Civil Service Commission, and since the commission includes operators and assistant operators of the fire alarm service, there does not appear to be any way of striking them from the roll through the medium of a court proceeding.

A proceeding to have the court construe the act in question as indicated by the fire marshals was begun a long time ago. There was a hearing in regard to the law points in-

volved in June, 1924, with the result that the court found that there was no basis in law for the contention that is made with respect to this matter. The case was dismissed on July 31, 1924. An appeal was prayed, but that appeal was dismissed at the October, 1925, term of the Appellate Court.

Although there has been no opinion rendered in this case in the reviewing courts, we are convinced that the decision of the Circuit Court was sound. There is no way of preventing the Civil Service Commission from making the classification that it has made except by amendment of the law. We are not called upon to express an opinion as to whether it is desirable to have the uniformed rank of the Fire Department exclusively in the Firemen's Pension Fund or whether other employees should be included. That is purely a question of policy. The law has been correctly interpreted both by the Civil Service Commission and by the Circuit Court, and we have no hesitation in saying that you may advise the firemen in your department that the position taken by them is in error. We do not believe they can accomplish anything by further court proceedings.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Protection of Street Ends and Safeguarding of Bridges.

February 20, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

Enclosed are all files in the matter of resolution introduced by Alderman Jensen relative to the "erection of fences

or maintenance of patrols along the Drainage Canal for safeguarding the lives of children."

The attached opinion of the attorney for the Sanitary District to the effect that "the city is liable for failure to protect street ends and place safeguards at bridges, as this comes under the control of the City of Chicago," may be accepted as a correct statement as to the law. However, the resolution as interpreted by us refers to dangers *along the banks of the canal*, so that the opinion of the Sanitary District's attorney does not pass upon the question at issue.

Although, as stated, it may be conceded it is the City's duty to protect street ends and to place safeguards at the bridges of the canal, in our opinion, the City having done so, is not liable to the traveler if he departs voluntarily from the highway provided by the City.

The law is also well established that:

"The City is not bound, under the law, to keep its streets absolutely safe. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their safety. * * *"

Brender v. City of Harvey, 251 Ill. 228.

The question, therefore, narrows itself to the situation arising when persons depart from the highway and enter on the property of the Sanitary District. In our opinion, the responsibility of the City, in effect, then ceases.

The Sanitary District, in our opinion, has the necessary power to establish a patrol if it so desires. Chapter 42, Ill. Statutes (Smith-Hurd), Drainage Act, Section 360, provides as follows:

"That the Sanitary District of Chicago shall have the right and power to appoint and support a police force, the members of which may have and exercise police powers over and within its right of way for a distance of one and one-half miles on each side of its main drainage channel, such police powers as are conferred upon and exercised by the police of organized cities and villages; but such police force, when acting within the

limits of such city or village, shall act in aid of the regular police force of such city or village, and shall then be subject to the direction of its chief of police, city or village marshals or other head thereof."

The Supreme Court, in the case of *Minderman, Administrator v. The Sanitary District of Chicago*, 317 Ill. 529, referred to in the opinion attached, decided that:

"A canal, pond or other open body of water on private property is not in itself an attractive nuisance as that term is used in describing an instrumentality which will render the owner liable for injuries to a child attracted to and injured by it."

Minderman v. Sanitary District, 317 Ill. 529.

In conclusion, therefore, in our opinion it is the City's duty to protect street ends and place safeguards at the bridges of the canal; it is for the Sanitary District to decide whether or not further protection is necessary along the canal, such as the construction of a fence or the maintenance of a patrol.

Respectfully submitted,

LAWRENCE J. FENLON,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Submission of Voters of Proposition Amending Municipal Court Act.

February 23, 1926.

HON. BERNARD W. SNOW, Bailiff of The Municipal Court of
Chicago.

Dear Sir:

In response to your letter dated February 19, 1926, in reference to the act amending the Municipal Court of Chicago,

approved July 1, 1925, we desire to say that we coincide with your view that Section 2 of said act appearing on page 335-6 of the Laws of 1925 is mandatory in character and directs that said act must be submitted to a vote of the legal voters of the City of Chicago at the first regular municipal, judicial, general or special election which shall occur in the City of Chicago after the date of passage of the act. Said act was approved July 1, 1925.

The language of the act is as follows:

“This Act shall be submitted to a vote of the legal voters of the city of Chicago at the first regular municipal, judicial, general or special election which shall occur in said city of Chicago after the date of the passage of this Act. The ballots to be used at said election in voting upon this Act shall be in substantially the following form,”

and the form is set up in the act itself, and further provides that:

“If a majority of the legal voters of said city voting on the question of said election, should vote in favor of consenting to said Act, the same shall thereupon take effect and become operative. (Smith-Hurd, p. 630.)”

You make inquiry as to whether this language makes it mandatory upon the Board of Election Commissioners to place this proposition upon the ballot, and if it is mandatory in that respect, whether it is also mandatory in requiring that it appear on the ballot used in the primary election to be held on April 13, 1926. It is our opinion that by the language of the statute itself a mandatory duty is imposed upon the Election Commissioners to place the proposition upon the ballot at the next regular municipal, judicial, general or special election which occurs in the City of Chicago. If the election held on April 13th is a special election within the meaning of the statute, an absolute duty mandatory in its character devolves upon the Election Commissioners to place this proposition on the ballot, in the application of the general principle of law that they are presumed to have knowledge of the duties imposed upon them by law. We are in-

formed that certain special elections are called on April 13th in addition to the primary election. Without examining the calls of those special elections, we would say that presumably they are such special elections as are contemplated in the section of the statute above referred to.

In reply to your final query as to whether or not under the wording of this particular section of the act, it is necessary to file any request with the Election Commissioners for the publication of the act on the ballot, and whether that request must come from the City Council, or whether it may be made from any other source, we desire to say that in view of the mandatory provisions of the act, we do not believe it is necessary for anyone to make a request upon the Election Commissioners for the placing of this proposition on the ballot. Their duty being fixed by statute, they will be presumed, as public officers, to do the things that are necessary in the line of their duties to give effect to the law, and if they fail to do so or refuse to do so, the law provides the means by which they may be compelled to perform this mandatory duty. The mere fact that they are compelled to place this proposition on the ballot, would not preclude the possibility of it being submitted at a subsequent election if it were necessary to use compulsion.

The rule with reference to the failure of the Election Commissioners to submit a question of this character when required to do so by law is laid down in the case of *People ex rel. v. Lueders*, 287 Ill. at page 115, where the court said:

“A writ of *mandamus* will not be ordered directing the performance of an act which the respondents have no authority or duty to perform and which would be illegal, and counsel invokes this doctrine and supports it by an argument that no valid election can now be held upon the petition because the time fixed in the petition for holding the election has passed. It is true that the remedy by *mandamus* sometimes proves ineffectual, and if it appears that the process of the court cannot become effective the writ will not be granted for that reason. Gross injustice may be done by the action of election officials in refusing to put the name of a candidate on

the ballot for an office to be filled at a certain time, and where the writ cannot be obtained in time for the election his right may be defeated by an appeal. Injustice may also be done to petitioners, as was the case in *People v. Knoll*, 276 Ill. 58, and *People v. Dillon*, *supra*, where the judgments of the circuit courts were right and this court could do nothing to affirm them. There are, however, duties which are continuing in their nature, and the courts can enforce their performance at any time by the writ of *mandamus*. It would be a reproach to the law if there is a right and no means to vindicate and maintain it, and that would be the case if the respondents, by refusing to perform their duty, have absolved themselves from all obligations of the law. There are many cases of continuing duties although a specific time is provided for their performance. An example of such a duty is the provision of the constitution in section 6 of article 4 that the General Assembly shall apportion the State every ten years, beginning with the year 1871, but, although the constitution fixes the time when an apportionment shall be made, the duty and power are continuing in their nature and the apportionment can be made at any time afterward within the ten-year period. *People v. Hutchinson*, 172 Ill. 486; *People v. Carlock*, 198 *id.* 150.

“In the argument that the writ should not be awarded on account of *laches* it is insisted that if the petitioners had kept busy they could have compelled the submission of the question at the election in November, 1918, when the municipal judges were elected, which is the only ground for insisting upon the denial of the writ on account of delay and is an admission that the duty is of a continuing nature and the obligation to perform it exists until it is performed, but on the question whether a submission of the question at a subsequent election would be illegal it is contended that it could only be submitted at the election in April, 1918. The petition asked for submission at the next election but did not name any date, and the substantial right was to have the question submitted to the voters, and there are regularly occurring elections at which it could be submitted. It would be contrary to reason and every instinct of justice and right that a refusal of the respondents to perform their duty at the first of those elections should enable them to defeat the law and the right of the petitioners.

“* * * The writ of *mandamus* is awarded as prayed for, commanding the respondents, August Lueders, Bernard Horwich and Frank X. Rydzewski, or the successors in office of them or any or either of them, to cause notice to be given in the manner provided by law that the proposition, ‘shall this city become anti-saloon territory,’ will be submitted to the voters at the next election of officers in the city of Chicago to be held on Tuesday, April 1, 1919, and shall cause the said proposition to be printed on the ballots to be used at said election and do and perform all other acts required by law for the submission of said proposition at said election.”

We would therefore say that a request by you to the Board of Election Commissioners to have this matter placed on the ballot would have the same effect as a request from the City Council because in any event the duty rests with the Board of Election Commissioners to place the proposition on the ballot without a request from any source.

Yours very truly,

FRANK J. CORR,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Tax for Construction of Buildings for Municipal Tuberculosis Sanitarium.

February 23, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We are in receipt of your letter of recent date in which you inquire whether you have correctly interpreted the meaning of the new provision of the Public Tuberculosis Sani-

tarium Act which authorizes a levy of one and two-tenths mills for this city in place of the mill formerly authorized.

The language contained in Section 1 of the Public Tuberculosis Act (Cahill 1925, p. 404), which is the subject of your inquiry, is as follows:

“* * * and shall have the power to levy a tax * * * not to exceed one and two-tenths mills on the dollar annually on all taxable property of such city or village of more than two hundred thousand population, of which tax in such city of more than two hundred thousand population the proceeds of not more than one-eighth of a mill during the four years beginning with the year 1925 shall be used exclusively for the construction and equipment of such new buildings as may from time to time be required as additions to the public sanitarium provided for herein; * * *”

The wording is not as clear as it might be, but we are of the opinion that the use of the word “exclusively” indicates that the intention of the Legislature was that, of the tax so authorized, one-eighth of a mill, or one and one-fourth cents on each one hundred dollars, was to be set aside, during the four years beginning with the year 1925, for construction and equipment of additions to the sanitarium. That part of the tax cannot be used in any other way.

It will therefore be necessary, as you suggest in your letter, to place the amounts collected on this eighth mill in a separate account, and the accumulation of these for the four years in question will constitute a fund from which expenses of such construction and equipment may be drawn, but the total may not be exceeded for such purposes. Your interpretation of the act and your proposed method of procedure conforms to our view of the law.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Distribution of Hand-Bills and Other Advertising
Matter in Streets, Suburban Stations and
Mail Boxes.**

February 24, 1926.

MARY E. McDOWELL, Commissioner, Department of Public
Welfare.

Dear Madam:

We acknowledge receipt of your communication to this department in reference to the interpretation of Section 2718 of The Chicago Municipal Code of 1922.

You wish to be advised in reference to three questions.

1. Whether or not it is permissible under the ordinances of the City to insert in mail boxes or leave at the entrance of residences (a) advertisements of businesses and professions; (b) advertisements of patent medicine; (c) advertisements of theaters and places of amusement; (d) notices of public meetings.

2. As to whether or not it is permissible under the ordinances to distribute or "pass out" on the street (including placing in automobiles) advertisements of the character and kind heretofore classified as (a), (b), (c) and (d) under your first interrogation.

3. As to whether or not it is permissible under the ordinances of the City to distribute or "pass out" at suburban stations advertisements of the character and kind classified as (a), (b), (c) and (d) under your first query.

Section 2718 of The Chicago Municipal Code (1922) to which you refer is as follows:

"DISTRIBUTION OF HAND-BILLS.) No person or persons shall distribute, cast, throw or place in, upon or along any of the streets, alleys or public places of the city, any hand-bills, pamphlets, circulars, books or ad-

vertisements, for the purpose or with the intent of advertising or making known in a general or promiscuous manner, any business, occupation, profession, medical treatment or medicine, under a penalty of not less than five dollars nor more than fifteen dollars for each offense."

It is also well to take into consideration in this connection the provisions of Section 366 of The Municipal Code (1922), which is as follows:

"366. DISTRIBUTION OF ADVERTISING MATTER.) It shall be unlawful for any person, firm or corporation, whether a licensed bill poster or sign painter or not, to distribute, hand out or scatter upon any street, avenue, alley, sidewalk or other public place in the city of Chicago, any circular, dodger, hand-bill, pamphlet, card, picture or any advertising matter of any kind whatsoever, or to distribute hand-bills or other advertising matter at houses, stores or places of business otherwise than by putting the same under doors or in letter boxes connected with the houses, stores or places of business, and when so distributing, no bell connected with the houses, stores or places of business shall be rung."

It is our opinion in answer to your first interrogation (from a reading of the above sections of the ordinances) that it is permissible under the ordinances of the City to insert in letter boxes connected with "houses, stores or places of business," advertisements dealing with (a) businesses and professions; (b) patent medicine; (c) theaters and places of amusement; (d) public meetings.

It is also well to note that Section 366 of The Municipal Code (1922) makes it directory to put the advertisements heretofore enumerated, if distributed, "under doors" of the "houses, stores or places of business." Merely scattering or distributing the dodger, circular, hand-bill, pamphlet or in whatever form the advertisement might be along the entrance of buildings without "putting the same under doors" is unlawful.

In reference to advertisements of patent medicine, Section 2762 of The Chicago Municipal Code (1922) states that

“no person shall * * * distribute or have in his possession with intent to * * * distribute in or upon any street, sidewalk, park or public property in the city any * * * pamphlet, circular * * * or notice of any kind giving or purporting to give information from whom or where medicine or anything whatever may be obtained for the cure, prevention or treatment of * * * venereal diseases.” Consequently, the patent medicine advertisements that are permitted to be distributed must not deal with “venereal diseases.”

In answer to your second question, it is our opinion that it is unlawful under the provisions of Section 2718 of The Chicago Municipal Code (1922) to “distribute, cast, throw or place in, upon or along any of the streets (or) alleys * * * of the city any hand-bills, pamphlets, circulars, books or advertisements for the purpose” of advertising (a) businesses and professions; (b) patent medicines; (c) theaters and places of amusement.

The ordinances heretofore set out do not speak of the distribution of hand-bills, pamphlets or circulars distributed for the sole and only purpose of notifying the public at large of public meetings. It is therefore our opinion that notices distributed for the single purpose of advising the public at large of public meetings in which the public as a whole are vitally interested do not fall within the inhibitions of the sections of The Municipal Code heretofore quoted.

Concerning the distribution of the type of advertisements enumerated in your second query as (a), (b) and (c) by placing the hand-bill, pamphlet or circular in an automobile parked on a street, it is our opinion that this is unlawful, as the intent undoubtedly of the City Council in framing the ordinances under discussion was to prevent the scattering of advertisements such as hand-bills, pamphlets or circulars along any of the streets or alleys. Placing an advertisement of the character described by you in an automobile is only a step in placing the hand-bill, pamphlet or circular on the street or alley. The general practice of distribution in auto-

mobiles, with which we are all familiar, is placing the advertisement on the seats or other parts of automobiles. Ordinarily such advertisement so placed is thrown a short time later on the street or alley by the owner or occupant of the automobile or wafted on the street or alley by a breeze or wind.

Concerning your third question, we have previously stated that Section 2718 of The Chicago Municipal Code (1922) prohibits the distribution of advertisements in "public places." Consequently, our answer to this question will be in great measure predicated upon whether suburban stations may be and have been considered as "public places."

"The term public as applied to a place is not an absolute, but a relative term, and is used in contradistinction to the term private."

State v. Sowers, 52 Ind. 311, 312.

Cahoon v. Coe, 57 N. H. 556, 595.

A public place does not mean a place devoted solely to the uses of the public, but it means a place which is in point of fact "public," as distinguished from private—a place that is visited by many persons and usually accessible to the neighboring public. A place may be public during some hours of the day and private during other hours. *Comprecht v. State*, 37 S. W. 734, 36 Tex. Cr. R. 434.

It is obvious from the above expressions of the courts that a suburban station is a public place.

Our opinion, therefore, is that it is unlawful under the provisions of Section 2718 of The Chicago Municipal Code (1922) to distribute in suburban stations advertisements of the character enumerated as classifications (a), (b) and (c) of your third query.

You ask as to whether or not there is any distinction between business and residence districts. The ordinances under consideration do not draw any distinction between business and residence districts, the inhibition of casting, throwing or placing along any of the streets, alleys or public places of the City any hand-bills, pamphlets, etc., where ap-

plicable therefore apply in equal measure to all sections of the City.

You further wish to be advised as to whether or not there is any distinction between cards and other forms of advertising material. Section 2718 of The Municipal Code (1922) groups "hand-bills, pamphlets, circulars, books or advertisements, for the purpose or with the intent of advertising or making known in a general or promiscuous manner any business, occupation, etc.," and Section 366 of The Chicago Municipal Code (1922) makes the following grouping: "Circular, dodger, hand-bill, pamphlet, card, picture or any advertising matter of any kind whatsoever." It is apparent from these classifications that no distinction is drawn between cards and other forms of advertising matter.

You further wish to be advised as to whether or not a license is required for the distribution of advertising material. Section 357 of The Chicago Municipal Code (1922) is as follows:

"357. LICENSE.) No person shall hereafter engage in, conduct, operate, manage or carry on the business or occupation of bill posting or sign painting in the City of Chicago without first having obtained a license as hereinafter provided."

Section 358 of The Chicago Municipal Code (1922) gives us the definition of "bill posting" and "sign painting" and is as follows:

"358. DEFINITION.) Bill posters and sign painters within the meaning of this article shall be considered to refer to all persons engaged in the business or occupation of posting by tacking, posting, painting, demonstrating or otherwise distributing upon the streets any advertising matter, bills, posters, pictures or any other matter or device whatever advertising the business of any firm or corporation, whether that of merchant, manufacturer, publisher or person or persons engaged in any business or industrial pursuit, or any operas, theaters, shows, circuses or other exhibitions, excepting those intended for charitable purposes; provided, however, that nothing herein contained shall be considered to apply to the painting of a store, office or other sign by sign paint-

ers, or to posting of legal notices by public officers or attorneys in the manner and in the places prescribed by law, or to individuals who are in the business of distributing circulars, handbills or business cards by placing them inside of the doors of dwellings or buildings within the city limits."

Consequently, as to whether or not an individual, firm or corporation is required to obtain a license depends entirely upon whether or not the business engaged in is of the kind or character as to come within the provisions of Sections 357 and 358 of The Chicago Municipal Code (1922), but if, however, the business conducted falls within the proviso of Section 358 excepting certain businesses—and "individuals who are in the business of distributing circulars, handbills or business cards by placing them inside of the doors of dwellings or buildings within the city limits" are specifically designated by this proviso—they are not required to obtain a license.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Use of Property Under Restrictions in Zoning Law.

February 24, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of February 9th requesting an opinion concerning certain uses of property upon the following premises:

1. At 12140 Michigan avenue there is a one and two story frame building used for the sale and storage of auto parts. By the Zoning Ordinance these premises are placed in a commercial district. The owner claims to have owned this property since December 23, 1922, and to have started the business on January 1, 1923.

2. At 12142 to 12146 Michigan avenue, there are no improvements but the property is used for the storage of old automobiles and auto parts. By the Zoning Ordinance the property is placed in a commercial district. The owner claims to have owned this property since December 23, 1922, and to have started the business on January 1, 1923.

3. At 16 to 36 East 121st place there are eight lots, a part of which is improved with a two-story frame building on the rear thereof 60'x40'x18' as a mill on the first floor and storage of sash and frames on the second floor. Lumber, old wagons, etc., are stored here. By the Zoning Ordinance the property is placed in an apartment district. The owner claims to have started business there four years ago.

4. At 23-35 East 121st place there are five lots. A permit has been issued recently for a two-story frame flat building to be located on one of said lots; the other four lots are used for storage of old autos and auto parts. The owner claims to have owned these lots since March 2, 1923, and has used the four lots in question ever since that time for such storage purposes.

5. At 20-36 East 122d street there are seven vacant lots, five of which are used for the storage of old autos and auto parts; the remaining two lots have not as yet been used for any purpose. The owner claims to have owned these lots since May 24, 1925, and has used the five lots from that time on up to the present for storage purposes. In both the latter cases, the property is zoned for apartments.

6. At 29-31 East 122d street a part of these premises is improved with a one-story frame barn in the rear used to stable four horses, hay, etc. The vacant lot and remaining part of improved lot is used for the storage of junk, old

wagons, etc. The owner claims that said premises have been used for the storage of junk for the period of three years. This property is zoned for apartments.

The State Zoning Enabling Act provides in Section 1 thereof as follows:

“In all ordinances passed under the authority of this Act, due allowance shall be made for existing conditions, the conservation of property values, the direction of building development to the best advantage of the entire city, village or incorporated town, and the uses to which property is devoted at the time of the enactment of any such ordinance. The powers by this Act given shall not be exercised so as to deprive the owner of any existing property of its use or maintenance for the purpose to which it is then lawfully devoted.”

In harmony with this provision of the State Zoning Enabling Act the Chicago Zoning Ordinance, which was passed by the City Council April 5, 1923, and approved by the Mayor on April 16, 1923, contains the following provisions:

“(a) NON-CONFORMING USE. A non-conforming use is a use which does not comply with the regulations of the use district in which it is situated.

“Section 14. NON-CONFORMING USES. (a) A non-conforming use existing at the time of the passage of this ordinance may be continued.

“(b) A non-conforming use shall not be extended, but the extension of a use to any portion of a building which was arranged or designed for such non-conforming use at the time of the passage of this ordinance shall not be deemed the extension of a non-conforming use.

“(c) A building other than an A3 use arranged, designed or devoted to a non-conforming use at the time of the passage of this ordinance may not be reconstructed or structurally altered to an extent exceeding in aggregate cost, during any ten-year period, 50 per cent of the value of the building unless the use of such building is changed to a conforming use.

“(e) A non-conforming yard storage use shall not be expanded in area of storage space so used.”

Section 25 of the Zoning Ordinance provides that it shall be enforced by the Commissioner of Buildings.

The Zoning Ordinance was intended to apply only to the future. It is not retroactive. It does not apply in any sense to buildings erected or businesses established at the time of its passage. If the ordinance was framed to apply to buildings existing or businesses established at the time of its passage, it would be clearly invalid as being not in accord with the provision of the enabling act, above quoted, authorizing its passage.

In the cases of uses of premises which you enumerate and which are non-conforming uses, if you believe from representations made that the said non-conforming uses were lawfully existing at the time of the passage of the Zoning Ordinance, you would have absolutely no authority under the provisions of the Zoning Ordinance to interfere with their continuance.

On the other hand if you find that such non-conforming uses were not lawfully existing at the time of the passage of the Zoning Ordinance, it is your duty to institute the necessary proceedings looking toward their discontinuance.

If there is anything further in reference to this matter that you desire from this department, will you kindly advise us?

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Payment of Child's Annuity Where Both Parents Are Dead.

February 24, 1926.

RETIREMENT BOARD, Policemen's Annuity and Benefit Fund.

Gentlemen :

Complying with your request for an opinion relative to annuity for the children of Michael Mullane, deceased policeman, the following is submitted :

Your letter states that Michael Mullane, police officer, died in the service on February 4, 1926; that Ella Mullane, his widow, has filed application for an annuity for herself and for annuities for each of the two children of Michael Mullane by a former marriage; that one of the children is living with her and the other is living with the brother of Officer Mullane; that neither of the children have been formally adopted by either herself or the brother of Officer Mullane, each of whom has custody of one child.

Your inquiry is as to whether or not, in making out the check or checks for these children, it will be permissible and proper for you to make one check payable to Mrs. Mullane for the child in her custody and one to the brother of Officer Mullane for the child in his custody, without any action on the part of Mrs. Mullane or the brother; and if not, what steps should they take to enable you to make payment to them.

1 .

Section 43 of the Policemen's Annuity and Benefit Fund Act, as amended in 1925, provides for the payment of "child's annuity" to the unmarried children of policemen until the annuitants shall have attained the age of 18 years.

Section 44 of the same act, as amended, provides as follows :

“Any annuity which shall be granted for the benefit of any child shall be paid to the parent of such child who shall be providing for such child, unless another person shall have been or shall be appointed by a court of law as the guardian of such child.”

II.

Your letter does not state whether or not the mother of these children is dead; if she is dead, or if she is living and not providing for such child, then there is no “parent” to whom the annuity can be paid under the act.

III.

I am of the opinion that no child’s annuity can be paid to the children of Michael Mullane until a guardian has been appointed by the Probate Court and a copy of the letters of the guardianship filed with your Honorable Body, after which check should be issued to the guardian so appointed.

Respectfully,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Setting of Water Meters by Licensed Plumbers.

February 25, 1926.

MR. THOMAS J. TERRELL, Master Plumber Member, and Mr. JULIUS NEWMAN, Journeyman Plumber Member, Board of Examiners of Plumbers.

Gentlemen:

This will acknowledge the receipt of your communication of February 23, 1926, requesting an opinion from this office.

You advise us that within the last three weeks the Board of Examiners of Plumbers have received several complaints regarding men other than licensed journeymen plumbers setting water meters for the City of Chicago.

You wish to be advised as to what authority your board has relative to the connecting and setting of water meters, and request us to give you our interpretation in connection therewith of Sections 2945 and 4105 of The Chicago Municipal Code (1922).

In this connection the pertinent provisions of Section 2945 are as follows:

“2945—PLUMBER’S BOND.) No person, except a licensed plumber, shall be permitted to make any alteration or repair to or do any work in or about any pipe or pipes connected with any part of the city water works system, or with any pipe or sewer connected with the city sewer system; provided, however, that such licensed plumber shall execute to the city a good and sufficient bond in the penal sum of * * * :

“No permit shall be issued to any plumber to do any work necessitating the disturbance of any street, alley or public way, or alteration, repairing or location of any service pipe or pipes connected with the water works system of the city, or any drain or pipe connected with the sewer system of the city, unless such bond be in full force and effect and on file in the office of the commissioner of public works.”

Section 4105 is as follows:

“4105. CONNECTION TO BE MADE AND PRIVATE SUPPLY PIPES LAID ONLY BY LICENSED AND BONDED PLUMBER.) No permit shall be issued to any person for the connecting of any service or supply pipe to the Chicago waterworks system, or for the laying of any private supply pipe, or for the making of a connection thereto, or for the installing or altering of any plumbing work which is connected or is intended for connection to the Chicago waterworks system, unless such person be a duly licensed and bonded plumber.”

Obviously, only licensed plumbers are permitted to do any work in or about any pipe or pipes connected with any

part of the city waterworks system, and since it is our understanding that the water meters now being installed by the City of Chicago are an integral part of the city waterworks system, it is therefore our opinion that only licensed plumbers should be permitted to "set" such water meters.

It is equally apparent from a reading of the above sections that it is unlawful to issue permits to any person "for the installing or altering of any plumbing work which is connected or is intended for connection to the Chicago waterworks system, unless such person be a duly licensed and bonded plumber." As a consequence of this provision permits to "set" water meters may be issued only to duly licensed and bonded plumbers.

In reference to your query as to what authority your board has in connection with this matter, Section 2944 of The Chicago Municipal Code of 1922 provides that:

"2944. PENALTY—REVOCATION OF CERTIFICATES.) Any person violating, neglecting or refusing to comply with any of the provisions of this article shall be fined not less than five dollars nor more than fifty dollars for each offense, and in addition thereto the certificate issued as herein provided may be revoked by the mayor on recommendation of the commissioner of health."

It is our opinion, therefore, that it is your duty only to permit the setting of water meters by licensed plumbers and in cases where this work is done by other than licensed plumbers, to cause proper proceedings to be instituted under the provisions of Section 2944.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

(See additional opinion explaining the above under date of April 6, 1926, at pages 715-716.)

Charges for Services of Fire Department Beyond City Limits.

February 26, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

In your recent communication addressed to the Corporation Counsel, you state:

“Under the Fire Department ordinance a charge should be made where the Fire Department is called upon by officials of villages lying adjacent to the City of Chicago.

“It has been the practice of the department for years not to send these villages bills for collection. These bills amount to a considerable sum of money. Recently some bills have been sent to the Comptroller for collection and the question has arisen in many cases, as to who called the Fire Department.”

You then request an opinion as to what policy should be adopted with reference to responding to alarms of fire from outlying villages and also as to how to proceed in the collection of such claims and what evidence is necessary to make such claims valid.

In and by Section 1187, Article III of Chapter XXIX of The Chicago Municipal Code of 1922, as amended May 21, 1924 (Council proceedings, p. 3077), it is provided:

“The chief fire marshal, subject to the approval of the fire commissioner, shall have authority to send fire apparatus and firemen outside of the corporate limits of the city of Chicago, *whenever requested so to do by the authorities of any city, town or village* lying contiguous to, or within a radius of one hundred miles from the city of Chicago, provided that such apparatus can, in the judgment of the chief fire marshal, be spared from service in the city of Chicago at the time requested.” (Italics ours.)

The foregoing section of the ordinance specifically limits the authority of the fire commissioner to furnish fire apparatus to outlying cities, towns or villages to requests therefor by "the authorities of any city, town or village." Even in the face of such a request the chief fire marshal is to exercise his judgment in the matter, *i. e.*, as to whether or not such apparatus can be spared from service in the City of Chicago at the time requested.

Section 1188 of the foregoing ordinance provides:

"The rates for service rendered by the fire department outside of the corporate limits of the city of Chicago, *as provided for in the preceding section*, shall be as follows." (Italics ours.)

Then follows an enumeration of charges for the use of various kinds of apparatus by the hour.

Section 1189 of said ordinance provides for the drawing of a warrant for collection, "on the city, town or village to which service was rendered, * * *."

From a consideration of the foregoing sections of the ordinance it is apparent that charges for service can only be made when rendered in accordance with the provisions thereof. We know of no authority by which a private citizen could bind a municipality to pay for services rendered on request of a mere individual.

I refrain from expressing any opinion as to what policy should be pursued with relation to present or future claims arising under the foregoing ordinance, as that is a departmental matter that may properly be presented to his Honor, the Mayor.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Withholding Payment of Judgment Against City on
Notice from Creditor of Judgment Creditor.**

February 26, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your recent communication addressed to the Corporation Counsel, you state:

"Request has been made for the payment of judgment, amount \$1,350, in favor of Wm. P. Halley, in the Superior Court, No. 401957, Dec. 9, 1925.

"We find from records in this office that under date of January 27th, 1921, a claim was filed by the Irish Fellowship Club, John P. Kiely, Treasurer, requesting the withholding of any moneys due Mr. Halley until the claim has been paid."

You then request an opinion as to how to proceed in the matter so that the City's interests will be protected.

From the certified copy of the judgment which accompanies your communication it appears that said judgment was rendered against the City of Chicago, defendant, in a certain case wherein William P. J. Halley was plaintiff; that the time for appeal therefrom has expired and said judgment is now final.

Municipal corporations are not subject to garnishment or similar process except where specifically authorized by statute. Neither are they required to take notice of claims for liens except where the same are specifically provided for by statute. (28 C. J., 55; *Chicago v. Hasley*, 25 Ill. 485; *Merwin v. Chicago*, 45 Ill. 133; *Triebel v. Colburn*, 64 Ill. 376; *Badenoch v. Chicago*, 222 Ill. 71; *Fast v. Wolf*, 38 Ill. App. 27.)

I find no authority under our statutes for withholding payment of the foregoing judgment to the judgment cred-

itor, notwithstanding the above-mentioned request that payment thereof be withheld in order to protect the interests of the claimant in question. After giving the statute concerning liens and garnishment as broad an interpretation as is possible, and although I am disposed to advise against paying the money in any doubtful case after written notice has been served, I am constrained to say that in the present instance no lien could attach, and that the amount of the judgment in question may be paid to the judgment creditor Halley.

I return herewith the certified copy of said judgment, also the documents submitted therewith.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Fee for Inspection of Site and Permit for Tank for Gas Filling Station.

March 1, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of February 19th, concerning Section 2279 of The Chicago Municipal Code of 1922, which reads as follows:

“* * * Before issuing such permit the Chief of Fire Prevention and Public Safety (now Chief Fire Prevention Engineer) shall first inspect or cause to be inspected the location or site where such tank is to be installed, and if the site is satisfactory the applicant

shall pay to the City Collector a fee of ten dollars for each tank. * * * Said fee shall be paid prior to the issuance of such permit and shall cover the cost of inspection thereof."

It appears from your letter that many of the applicants for permits do not pay any fee to the City for the inspection of the site where a tank is to be installed, for the reason either that the site is disapproved by your department or the applicant does not return to receive the permit after the site has been approved by your department.

You suggest that the City should receive compensation for these inspections whether or not the permit is issued, and you ask the advice of this department as to whether you can exact the fee at the time application is made.

It seems clear from a reading of the above section that the fee is to be paid only in case the site of the installation of the tank is satisfactory, and the fee is to cover the cost of the inspection. This fee is obviously to cover not only the inspection of the site, but also the inspection of the installation, material and workmanship after the installation of the tank or tanks.

In cases, therefore, where tanks are not installed because of the fact that the site is not approved by your department, or because of the fact that the applicant fails to return to your department for his permit after the site has been approved by your department, you would have no authority under the ordinance to exact the fee specified in the ordinance.

In order to exact the fee at the time the application is made, it would in our opinion be necessary to have the ordinance amended.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Ticket Scalping Ordinance.

March 1, 1926.

HON. JACOB M. ARVEY, Chairman, Committee on Judiciary.

Dear Sir:

In your letter of recent date you ask for an opinion as to "whether it is possible to enact legislation, either State or municipal, to prohibit any person from selling a theater ticket for more than the price printed thereon." Such a law as you indicate, which includes all persons, is not possible under our Constitution. This is true whether passed by the City Council or by the General Assembly. Such a provision may be applied to the owner of the theater who is subject to the police power, or his agents, in case it is made a condition of the granting of the license.

The legislature, in 1907, passed an act prohibiting the sale of a ticket for a price in excess of the advertised or printed rate therefor. This act was attacked as unconstitutional, and the Supreme Court so held in the case of *People v. Steele*, 231 Ill. 340. The court in that case went so far as to say that the theater owner himself may sell above the printed rate, using the following language (p. 346):

"The statute prohibits the sale of a theater ticket at a price above the printed rate and prohibits the establishing of an agency for such sale. There is nothing immoral in the sale of theater tickets at an advance over the price at the box-office. Such sale is not injurious to the public welfare and does not affect the public health, morals, safety, comfort or good order. It does not injure the buyer or the proprietor of the theater. The buyer purchases voluntarily. He is under no compulsion. If the conducting of a theater is a mere private business, there is no reason why the proprietor may not sell the tickets when and where, at what prices and on what terms he chooses.

People v. Steele, 231 Ill. 340-46.

The ordinance providing for the control of the theater owner and his agents was upheld in the case of *People ex rel. Cort Theater Co. v. Thompson*, 283 Ill. 87. Distinction between that case and the one which we quoted from may readily be seen by noting the following from the opinion of the court on page 93:

“The corporation counsel in his brief and argument says: ‘The purchaser of such tickets, so far as this ordinance is concerned, may re-sell them at an advanced price or do anything else with them which he may desire to do.’ Considering the whole ordinance with its evident purpose, it does not prohibit sales to brokers or any other class of persons, but is designed to prevent theater owners from entering into such arrangements as are stated in the ordinance.”

People ex rel. Cort Theater Co. v. Thompson, 283 Ill. 87-93.

While the question you asked was susceptible of a very short reply, we deemed it proper to elaborate on it somewhat in order that your committee may understand fully the distinction between the two classes of cases which are not readily distinguishable unless they are explained.

Very truly yours,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Transfer of Stationary Engineers from City to Board of Education and Vice Versa.

March 2, 1926.

HON. DONALD S. MCKINLEY, Alderman 19th Ward.

Dear Sir:

You request the Law Department to render “an opinion as to whether it is now legal to transfer stationary en-

gineers employed by the City to the Board of Education and *vice versa*." In our opinion this depends wholly on the official classification of the respective positions as made by the Civil Service Commission. This presents rather a question of fact than of law.

The Civil Service Commission is expressly empowered and directed by Section 3 of the Civil Service Act to "*classify all the offices and places of employment in such city, with reference to the examinations hereinafter provided for, except those offices and places mentioned in Section 11 of this act.*" And Section 4 charges the commission with the duty to "make rules to carry out the purposes of this act, and for examinations, appointments and removals in accordance with its provisions, and the commission may, from time to time, make changes in its original rules."

In the exercise of its powers and functions the Civil Service Commission, in January, 1924, duly considered and denied the request for the transfer of engineers, the legality of which transfer you now inquire about. The commission has supplied us with a history of the case, a statement of the facts involved and some of the reasons for their decision. This statement follows:

"ENGINEER-CUSTODIANS.

The first examination No. 403 for Engineer-Custodians, called Mechanical Engineer (Board of Education) was held March 4, 1899, 244 applicants passing. The title Mechanical Engineer (Board of Education) was used in all examinations until the regrading of these positions in 1911, when the schools were reclassified and the engineers placed in salary groups by resolution of the Board of Education as shown in the minutes of the Board meeting of Oct. 18, 1911, as follows:

And it is hereby expressly understood that each engineer shall be classified in that group in which he shall be found at the time this grouping goes into effect. The groups shall be defined as follows:

Group A: All positions of "School Engineer" receiving a total salary of \$3,000 per annum or greater.

Group B: All positions of "School Engineer" receiving a total salary of \$2500 per annum or more, and less than \$3000 per annum.

Group C: All positions of "School Engineer" receiving a total salary of \$2100 per annum or more, and less than \$2500 per annum.

Group D: All positions of "School Engineer" receiving a total salary of less than \$2100 per annum."

Shortly after the establishment of these positions by groups on a salary basis, the salary limits were discontinued and the square foot basis was substituted.

The four groups were classified under one grade. Advancements were made from group to group by examination within the same grade.

This rule was in force until June 1, 1920, when the groups were classified by grades in the Steam and Operating Engineering Service, together with the pumping station engineers, as follows:

Grade 2—Fireman, Operating Engineer, Group C (oilers), Station Engineer.

Grade 2—Engineer-Custodian (less than 35,000 square feet).

Grade 3—Operating Engineer, Group B (Third Assistant Operating Engineer).

Grade 3—Engineer-Custodian (35,000 to 45,000 square feet).

Grade 4—Operating Engineer, Group A (Second Assistant Operating Engineer).

Grade 4—Engineer-Custodian (45,000 to 60,000 square feet).

Grade 5—Assistant Chief Operating Engineer (First Assistant Operating Engineer).

Grade 5—Engineer-Custodian (over 60,000 square feet).

Grade 6—Chief Operating Engineer.

Grade 6—None.

Dating back to the first examination in 1899, separate examinations have been held for engineering positions in the schools, and the lines of eligibility for promotion were clearly defined. The pumping station engineers also have a well defined line of eligibility for promotion as provided for under the above classification. To permit a transfer or certification from one branch of the engineering service to the other would

cause endless confusion in the service and the legality of such action would be in doubt.

The peculiar duties of the employes working in the school service have nothing in common with the duties involved in the operation of a pumping station power plant or of a police station heating plant.

The men, however, who are employed in the Chicago Public Library, City Hall Building and Municipal Tuberculosis Sanitarium, have duties which require a knowledge of the principles of ventilation and whose duties are similar in many respects to the duties of the school engineer. Most of these employes obtained their Civil Service status by examinations held for positions in the pumping stations, and to them it may appear that an injustice is being done.

The present contract system whereby an Engineer-Custodian is given so much per month for the handling of a school and allowed to hire his own common labor necessarily requires men who are trained in this particular kind of work, and the Civil Service Commission has apparently considered a separate line of promotion is necessary for such a group.

Date—Jan. 2, 1924."

The Civil Service Commission having thus officially classified the respective engineers as in different grades, ranks and lines of service, and having actually denied the transfer of such engineers, it would not be "legal to transfer stationary engineers employed by the City to the Board of Education and *vice versa*," so long as such official classification remains unchanged or unmodified. The power to do this is exclusively in the commission by virtue of the Civil Service Act. The Supreme Court has said that

"The success of the system (Civil Service) in the nature of things, rests primarily with the persons charged with its administration. So long as the administrative agents are making an honest effort to carry out the provisions of the law in its true spirit they should be left free to exercise a reasonable discretion in all matters depending on information of details and local conditions."

The People v. Errant, 229 Ill. 56, 61.

The proper and reasonable exercise of discretionary power vested in the Civil Service Commission, as an arm of

the executive branch of the government, is not subject to review and reversal by the judiciary. The courts may not substitute their exercise of discretion and judgment for that of the Civil Service Commission in a matter which is expressly placed within the jurisdiction of the commission by the Civil Service Act.

City of Chicago v. People, 210 Ill. 84.

The People v. City of Chicago, 234 Ill. 416, 420.

City of Aurora v. Schoeberlein, 230 Ill. 496.

If it is not within the power of the courts to set aside a decision of the Civil Service Commission, which, as in this case, we must assume was properly and reasonably made, it is not within the province of the City's Law Department to express an opinion adverse to the official decision of the commission.

We are therefore of the opinion that, under the present classification and ruling of the Civil Service Commission, it would not be "legal to transfer stationary engineers employed by the City to the Board of Education and *vice versa*."

There is another phase of this matter that perhaps should be referred to here. The School Board, under a system prevailing for many years, has operated its schools under contract with the "engineer-custodians" who, under such contract, employed the stationary engineers and other attendants necessary to the operation of the schools. This system does not recognize the application of the Civil Service Law, and, therefore, the School Board will not make request upon the Civil Service Commission for certification of eligible stationary engineers for appointment, nor approve the transfer of city engineers to their positions at the schools. An action in mandamus was recently instituted against the School Board and Civil Service Commission to compel them to recognize all such positions as coming under the Civil Service Law and regulation, and to fill them solely in accordance with the provisions of the Civil Service Act as all other positions and places of employment in the City. The lower court sustained the petitioner's contention and

ordered the issuance of the writ of mandamus. This case is now pending on appeal in the Appellate Court, and the decision to be reached will necessarily affect the situation you inquire about.

Yours very truly,

FRANCIS J. VURPIELAT,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Lease and Purchase of Sites and Buildings for Branch Libraries.

March 2, 1926.

HON. COLIN C. H. FYFFE, President, Board of Directors, Chicago Public Library.

Dear Sir:

We have your letter in which you call our attention to a proposition made to the Board of Directors of the Chicago Public Library on February 1, 1926, by the Shank Co. The offer of this company contemplates the procuring of sites and the erection thereon of suitable branch libraries which will ultimately be taken over by the Library Board through leases that will amortize the cost of same. You state that you are authorized to ask for an opinion from this department as to whether the arrangement proposed is valid.

The plan is set forth in a letter submitted to the Library Board at its meeting of February 8, 1926, and appears in its printed official record at page 32. The plan, in brief, is that the company will purchase the sites and erect the

buildings and then lease them to the public library at such a price that at the expiration of ten or twenty years the full cost of grounds and buildings will have been paid and title will then be given to the City, free of encumbrances, upon the payment of \$1; the properties to be held in trust in the meanwhile by some reputable trust company.

We are of the opinion that such an arrangement as is proposed could be lawfully entered into under the power of the Public Library Board to lease and to acquire property for such purposes.

We had occasion to go into a similar question several years ago, at which time it was suggested that a central police station and Municipal Court building could be acquired by the City in this manner. You will find our opinion on this subject in the printed volume of "Opinions of the Corporation Counsel and Assistants from January 1, 1920, to April 15, 1923," at page 495.

At that time we held that the City could enter into such a lease and that the amount remaining due from year to year would not under those conditions be included within the debt limitation of the City. We cited the following on this point:

Dillon on Mun. Corp. (5th Ed.), Sec. 200.

E. St. Louis v. E. St. L. G. L. & C. Co., 98 Ill. 415.

City of Chicago, v. Galpin, 183 Ill. 399.

Schnell v. City of Rock Island, 232 Ill. 89.

Cain v. City of Wyoming, 104 Ill. App. 538.

You have called our attention to several authorities along the same line, among which the case of *Hay v. City of Springfield*, 65 Ill. App. 671, seems to be very much in point.

We know of no reason why such an agreement as you outline is not entirely legal in case it is deemed expedient to acquire the property in that way. Although we feel reasonably certain that the courts will not construe the obligation created by such a lease as a debt which goes against the debt limitation, there is a slight element of doubt in that regard which is not entirely cleared up by the authori-

ties that we have cited. That, however, does not militate against the validity of the plan.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Transfer of Certificate of Fitness.

March 2, 1926.

HON. THOMAS P. KEANE, City Collector.

Dear Sir:

Under date of February 26, 1926, you requested an opinion as to whether the provision of Section 2438-39 of The Chicago Municipal Code of 1922 applies to certificates of fitness issued in connection with dry cleaning establishments (Section 1415), handling of explosives (Section 1431), and carrying or transporting motion picture films (Section 1479, par. b).

In reply thereto we beg leave to submit the following:

A certificate of fitness is of a personal nature, and is only issued to a person that has satisfied the proper authorities that he has the necessary skill, ability and qualifications for the particular calling required for the issuance to him of such certificate of fitness, and is not transferable. It is apparent that the City Council had this distinction in mind when it passed the several ordinances referred to in your letter.

Section 1415 provides that

“* * * before any operation shall begin under a license for the business of dry cleaning in which gasoline,

naphtha, benzine or other volatile oils are used, as herein provided, the licensee shall file, with the Chief of Fire Prevention and Public Safety, the name of the person designated by him to have charge of the room, the equipment, the gasoline, naphtha, benzine or other volatile oils, and the handling and using of same during the conduct of such business of dry cleaning, and any such person before being permitted to exercise any of such functions, shall make application in writing to the Chief of Fire Prevention and Public Safety for a certificate of fitness. * * *

Section 1431 also provides that

“Before any operation shall begin under a license for the transportation or for the use of explosives in blasting, as herein provided, the licensee shall file with the Chief of Fire Prevention and Public Safety, in writing, the name or names of the person or person designated by him to load holes or discharge explosives, to prepare charges and load the holes, to transport by wagon or otherwise, or to have the care of magazines as herein provided. Any such person before being permitted to exercise any such functions, shall make application in writing to the Chief of Fire Prevention and Public Safety for a ‘certificate of fitness’ and before the issuance of any such certificate, the Chief of Fire Prevention and Public Safety shall examine such applicant as to his qualifications to fill such position or positions under the conditions herein prescribed. No person shall be permitted to have the actual care and handling of such explosives without first having obtained a certificate of fitness as herein provided. * * *

Section 1479, Par. (b), provides that

“It shall be unlawful for any person to carry or transport any motion picture films described in this section without first obtaining a ‘certificate of fitness’ as hereinafter provided for. Any person desiring to carry or transport such films shall make application, in writing, to the Chief of Fire Prevention and Public Safety, for a ‘certificate of fitness,’ and before the issuance of any such certificate, the Chief of Fire Prevention and Public Safety shall examine such applicant as to his qualifications to fill such position under the conditions herein prescribed. * * *

Sections 2438 and 2439 of The Chicago Municipal Code of 1922 are not applicable to any of the sections above mentioned, and a certificate of fitness issued to one person is not transferable to any other person regardless of the other person's qualifications. The other person must submit and receive a separate certificate.

Respectfully submitted,

JAMES I. McCARTHY,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Encroachment on Harbor Area by Lessening Length and Width of Slip.

March 3, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Answering yours of February 8, 1926, to which is attached Permit No. 1163-A, granting the Atchison, Topeka & Santa Fe Railroad Company permission to encroach on the harbor area of the City of Chicago by lessening the width of the Santa Fe slip approximately 25 feet and by lessening the length thereof approximately 100 feet; said slip being located on the southerly side of the west fork of the south branch of the Chicago river next west of Robinson street.

The slip in question is shown on map official 3, page 142, in the Map Department, as an "old slip" only, with no other indication as to whether it is public or private.

The Supreme Court held in the recent case of *City of Chicago v. The C. B. and Q. R. R. Co.*, 319 Ill. 351, on page 357, that:

“To effect a public dedication the intention of the owner to give the land to the public and the particular use for which the land is given must be made to appear. (*Gentleman v. Soule*, 32 Ill. 271; *City of Chicago v. Wright*, 69 *id.* 318; *Maywood Co. v. Village of Maywood*, 118 *id.* 61; *Birze v. City of Centralia*, 218 *id.* 503; *Poole v. City of Lake Forest*, 238 *id.* 305.)

No particular way or manner is, however, necessary to manifest such an intention. (*Ingraham v. Brown*, 231 Ill. 256; *People v. Chicago and Northwestern Railway Co.*, 239 *id.* 42; *Thompson v. Maloney*, 199 *id.* 276.) A dedication may be made by a survey and plat alone, without any dedication, either oral or on the plat where it is evident from the face of the plat that it was the intention of the proprietor to set apart certain grounds for the use of the public. (*Maywood Co. v. Village of Maywood*, *supra*; *Du Pont v. Miller*, 310 *id.* 140.)

“The actual use to which a roadway or waterway is put may be of assistance in determining whether it is public or private. (*Ligare v. Chicago, Madison and Northern Railroad Co.*, 156 Ill. 249; *Du Pont v. Miller*, *supra*.)

“A slip extending into land from a navigable river has a well known use in commerce and navigation and for the docking of vessels, and when designated on a plat will be presumed to be intended for its ordinary use. (*Du Pont v. Miller*; *supra*; *McAlpine v. Chicago Great Western Railroad Co.*, 68 Kan. 207.) Neither the word ‘public’ nor ‘private’ precedes the designation of any of the slips shown by the plat. The dock company was careful to avoid a dedication of the streets to the public by expressly limiting their use to private purposes. It could easily, by the use of the word ‘public’ or ‘private’ with reference to the slips, have made its intention in respect to them clear. It is true that a public dedication will not be presumed in the absence of all evidence that such was the proprietor’s intention. (*People v. City of Lake Forest*, *supra*.) Yet the use of the word ‘private’ is not necessarily controlling, for if that word is marked upon a plat and the evidence shows that space so marked was intended for public use, the evidence is sufficient to overcome the designation on the

plat. (*Smith v. Heath*, 102 Ill. 130.) The word 'slip' without being preceded by the word 'public' is often used when a public slip is intended. (*Thompson v. Mayor of New York*, 11 N. Y. 115; *Du Pont v. Miller*, *supra*; 7 Words and Phrases, p. 6532; 1 Farnham on Waters, p. 521.) In the interpretation of maps and plats all doubts as to the intention of the owner should be resolved most strongly against him. (*Thompson v. Maloney*, *supra*; *People v. Chicago and Northwestern Railway Co.*, *supra*.) The slip in question opens into a navigable water, the proprietor did not impose any limitation upon its use, and from a consideration of the whole plat we are convinced that the slip was dedicated to the public use."

In view of this decision, we cannot agree with the contention of the attorney for the Atchison, Topeka and Santa Fe Railway Company that the slip in question is a private slip and that they have exclusive control and jurisdiction up to the harbor line; we take an opposite view.

We have noted carefully the reasons given by you as to why the contemplated improvement should be allowed, and therefore suggest that the following condition be inserted in the permit when issued:

This permit is issued and accepted with the distinct understanding that although an encroachment on the harbor area is authorized thereby, said encroachment shall be considered as of a temporary nature and tolerated by the City of Chicago to permit a water terminal improvement, and nothing herein contained shall be construed as an abandonment or waiver of any rights the City of Chicago has in and to the said slip, especially in view of the decision handed down by the Supreme Court in the 319 Ill. 351, *City of Chicago v. C. B. & Q. R. R. Co.*"

Very truly yours,

CARL HJALMAR LUNDQUIST,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Jurisdiction Over Woodland Park and Groveland Park.

March 6, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

Your communication of recent date addressed to the Corporation Counsel concerning the jurisdiction of the Department of Public Works over the alleys in tracts known as Woodland Park and Groveland Park, lying between 33d and 35th streets, Cottage Grove avenue and the Illinois Central railroad right-of-way, has been referred to the undersigned for consideration and reply.

Accompanying your communication is a letter from John J. Carroll, superintendent of the Second Ward, addressed to Thomas H. Byrne, Superintendent of the Bureau of Streets, setting forth that certain gates have been placed across the north and south alleys in the above mentioned tracts by the property owners and that the east and west alleys, being blind alleys ending at the right-of-way of the railroad, are too narrow for the turning around of garbage wagons therein, and that said property owners decline to permit the use of the north and south alleys in connection with the collection of garbage by the City's wagons or trucks.

The foregoing tracts are a part of Oakenwald Subdivision, which was laid out in 1855 by Stephen A. Douglas, the title being vested in the State of Illinois in trust for the use of the owners of the lots fronting or bounding on the same, to be used and enjoyed by such owners in common as private parks, to be ornamented, regulated and protected in such manner as the majority of such owners shall from time to time prescribe, and the alleys to be deemed private alleys subject to like condition and use.

With reference to the present difficulty concerning the collection of garbage, the letter from Mr. Hugh T. Martin (representing the property owners) to John J. Carroll, superintendent of the Second Ward, which accompanies your communication, states: "We are, of course, very glad to cooperate with your Department, but the Park Associations are obligated by law to control and regulate the use of these private alleys."

Repeated requests for a conference with Mr. Martin in relation to the foregoing difficulty have been unsuccessful. Mr. Martin has failed to appear. It therefore becomes necessary to consider the powers of the Commissioner of Public Works in the matter, as defined by ordinance.

In and by Section 1587 of The Chicago Municipal Code of 1922, it is provided:

"It shall be the duty of the head of every family, occupying or in possession of any house, building, flat, apartment, tenement or dwelling place in the city of Chicago, which is a private residence, and for which a vessel or vessels for ashes and miscellaneous waste, or any of them, have been provided, to present or place or cause to be presented or placed, such vessel or vessels *upon the edge of the sidewalk adjoining said premises, or on the rear of the lots of said premises, for the removal of the contents of such vessel or vessels, at such times, and in such manner as the commissioner of public works may direct.* It shall be unlawful for any person to place any such vessel in any alley within the city and in all cases when such vessel is placed on the rear of the lot for the purpose of having its contents removed it shall be entirely within the lot line."

I am of the opinion that under the foregoing ordinance the Commissioner of Public Works has ample authority to require the garbage cans in question to be deposited "upon the edge of the sidewalk adjoining" the premises in question, for removal by the City's wagons from that point, if in his opinion the removal of such garbage from cans placed on the rear of the lots is impracticable by reason of the re-

fusal of the owners to permit the use of the north and south alleys.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Drapes in Audience Rooms and Standing in Lobbies of Theaters.

March 6, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of January 26, 1926, in which you ask for an interpretation of the sections of the fire prevention ordinances dealing particularly with theaters and places of public assembly in connection with (1) the use of decorations in the audience rooms of theaters, and (2) the assembling of patrons in theater entrances.

You inform us that you have recently had conferences with about 70 theater owners relative to crowding of aisles, entrances and lobbies, as well as the use of combustible decorations and drapes in the audience rooms of theaters, and that the attorney for one of the theater organizations has placed before you their interpretation of these ordinances.

It is their contention that under the present fire prevention ordinances any decorations that are treated with a solution that renders them non-inflammable may be put upon the walls of theater audience rooms. It is also claimed that when decorations or scenery are so treated they are

rendered fireproof, or at least incombustible, and that they are no more a fire hazard in the audience room of a theater than scenery similarly treated is on the stage, although the stage scenery has the additional protection of being behind the theater's steel curtain.

Your department contends that this construction was not the intention of the framers of the ordinance, in that the steel curtain which it is necessary for theaters to employ under the present ordinances serves not only as a protection against panic, but also against the spread of fire in the event that the scenery on the stage becomes ignited and forms an effective barrier in the path of the flames, whereas there is no barrier or protection of this character so far as the decorations or drapes in the audience room are concerned. You therefore hold that the scenery on the stage, because the audience has the added protection of the steel curtain, should be permitted when properly treated, while the decorations or drapes on the walls of the theater audience room, although they might possibly have been treated chemically in the same manner as the scenery on the stage so far as inflammability is concerned, are not permissible.

You point out a specific instance of the danger of fire from such source by informing us that, within the last 30 days, at the Apollo Theater, supposedly fireproofed scenery became ignited and burned in view of the audience; but a panic or other disastrous result was averted because of the possibility of dropping the theater's steel curtain.

You also state that a great number of the theaters now have decorations and drapes on the walls of the audience room and along the top of the proscenium wall outside of the protection of the steel curtain. Your department believes that these decorations and drapes not only are liable to catch fire, but might also ignite the scenery on the stage before an opportunity is given to lower the steel curtain. You further declare that these drapes and decorations sometimes hang over or come in contact with electric wires and thereby there is another possibility of their becoming ignited and causing a panic.

As to this, you give us a specific experience in the case of the Adelphi Theater, where, you say, something over a year ago all of the so-called fire-proof scenery on the stage burned up.

Because of these possibilities the fire Fire Prevention Bureau has deemed it its duty to insist that all drapes, even though they are presumably properly treated with a chemical fire-proofing solution making them non-inflammable, be taken down and removed from the audience rooms of theaters.

Your first inquiry is whether, since the Mayor has announced that he will revoke the licenses of theaters that do not comply with the ordinances, it is your duty to require the removal of these drapes on the walls of audience rooms.

The answer to this question, with the above stated facts in mind, hinges on the interpretation of paragraph (h) of Section 1337, Article VII, Chapter XXXI, of The Chicago Municipal Code of 1922, which is as follows:

“No combustible material other than painted decorations shall be applied to the walls, ceiling or curtain of an audience room in any building of class IV or V.”

It should be borne in mind that this paragraph appears in a section headed “Scenery,” and that its interpretation must be such as to harmonize with the whole section, of which there are eight distinct parts or paragraphs. A distinction is made in all of these paragraphs between “scenery,” as defined in the first paragraph, and ordinary curtains and drapes. “Drop curtains” are included within the term. It would seem from the way the words “drop curtain” are used that this term is intended to include scenery that is hung from above, since, in one paragraph, “drop curtains” are limited to three and four.

The first paragraph of Section 1337 reads as follows:

“(a) ‘Scenery’ as used in these provisions shall include all scenery, drop curtains and wings which are constructed or made of cloth, canvas or combustible material, whether stationary or movable.”

This paragraph indicates that the council regarded "scenery" as made of combustible material. The section then goes on to prohibit the use of such scenery, and also draperies and stage paraphernalia of any sort, upon the stage, unless it is treated with a fire-proofing solution. By necessary inference, when so treated, scenery, draperies and stage paraphernalia may be used upon the stage. The paragraph permitting it reads as follows:

"(c) No scenery, draperies or stage paraphernalia of any sort shall be used upon the stage of any room used for the purposes of class IVb, class IVc, or class V, unless such scenery and paraphernalia shall have been treated with a paint or chemical solution which shall make it non-inflammable, nor unless such treated scenery and stage paraphernalia has been tested and approved by the chief of fire prevention and public safety, and if found to be inflammable he shall require same to be fireproofed without delay."

The next paragraph limits the amount of scenery on the stage, and paragraphs (e), (f), and (g) are designed to regulate scenery in other ways which we need not consider. We therefore come to paragraph (h) with scenery, draperies and stage paraphernalia permitted on the stage under certain conditions, and find that paragraph (h) prohibits the use of combustible materials altogether from the walls, ceiling or curtain of an audience room. Nowhere do we find, either by direct permission or by inference, any language which indicates that in the audience room combustible materials of this kind may be used when properly treated. To take the position that it is no more dangerous to have such draperies in the audience room than on the stage would be substituting our judgment for that of the City Council.

You wish further to be advised whether or not under the present ordinances people are permitted to assemble in the entrance of theaters, regardless of how much other exit space is provided. We assume that, by the words "under the present ordinances" you refer to Section 1347 of The Chicago Municipal Code of 1922, which is as follows:

"1347. AISLES, PASSAGEWAYS, CORRIDORS AND EXITS TO BE KEPT CLEAR.) All aisles, passageways, corridors and exits of all such places above referred to shall be kept free from camp stools, chairs, sofas, draperies and other obstructions, and no person shall be allowed to stand in or occupy any of such aisles, passageways, corridors or exits during any performance."

The phraseology in Section 1347 "of all such places above referred to" has reference to Section 1346 of the code designating any "building or premises used for the purposes of Classes I, II, IV, V, VII or VIII, where persons are gathered for * * * worship, conference, instruction or entertainment." The section does not specifically mention "entrance" or "lobby," and it is therefore contended that the answer to your question depends on whether such places are included within "aisles, passageways, corridors and exits." There are many other sections of the fire prevention ordinances, and also of the building ordinances, which relate to the question in hand, some of which speak of "entrance doors," "entrance corridors" and "foyers," although none of them seem to mention "lobby."

There would not be much doubt about the scope or meaning of the section just quoted if applied to the theaters in existence at the time it was first enacted, or even if it were enacted today and applied to theaters now in existence. But it is insisted that the section was intended to apply to theaters as they existed twenty years ago, and that since then a new form of theater has sprung into existence which contains spacious lobbies expressly intended to accommodate large numbers of prospective patrons who are unable to secure seats at the time they stand there.

While it may be entirely safe and proper to alter the ordinances in such a way as to make provision for this new type of building that provides "standing room" on the outside of its auditorium instead of within, we are unable to so change the meaning of the provisions now in the code as to meet the situation. The language used is not progressive and means the same now as it always meant. The Fire

Prevention Ordinance was first enacted on July 22, 1912, and while the particular provision was in the code before that, the ordinance passed at that time was supposed to be up-to-date in every way.

It cannot be assumed that the City Council in legislating on keeping "aisles, passageways, corridors and exits" clear, forgot about the main entrance to the theater. The words "passageway" and "corridor" unquestionably include the main entrance, or "lobby" as it is frequently called. Not only is that in the dictionary definition of the words, but we find the words used in that express way in the ordinances, as where they speak of "the principal entrance corridor of a theater." (Section 610, Chapter XVII, Buildings.) Webster defines "passage" as "vestibule, hall, corridor, entry"; a "passageway" (by reference to the word "passage") as "a common avenue to various apartments, or a way connecting one apartment with another in a building, as a hall, corridor, lobby, vestibule, or entry"; and a "corridor" as "a passageway, especially covered."

Hence, the literal meaning of the section under consideration precludes the idea that the City Council omitted the main entrance or lobby.

We do not have to depend entirely on the phraseology of this section, however, to get at the intention of the City Council. There are many other sections of the fire prevention chapter of the code which point the same way.

Section 1344 prohibits more than the certified capacity to enter a theater. Section 1363 requires the entrance to be kept free from turnstiles, railings and obstructions of every kind. While this does not refer specifically to people, it indicates the intention to keep the place clear, Section 1369 is much to the same effect, requiring such places to be kept free of furniture and other obstructions. By Section 1323 it is made the duty of the stage fireman to see that the aisles and corridors are kept free from all obstructions. From all of these we can deduce no other intention than that the entrance is to be kept clear.

To construe the ordinances in this way in regard to standing in the lobby may be a very serious matter to the large new motion picture houses, which have provided exceptionally large entrances and have in some cases exceeded the necessary quota of exits with the express object in view of accommodating persons in the lobby whose patronage they might otherwise lose—especially in inclement weather.

But on the other hand, the use of the lobby without careful supervision and adjustment to the means of egress is so fraught with danger that we feel compelled to advise you against permitting it without council action. To attempt to divide off a space wherein people may congregate while enough of the entrance is left open to meet the exit requirements of the code is not feasible. The placing of dividing rails is clearly contrary to the spirit of the Fire Prevention Ordinance, and in no other way can a crowd of people be held back. If there is to be any deviation from the rule heretofore followed in this respect it should be done by ordinance, so that the extent of the new privilege, if granted, will be exactly defined.

We refrain from offering any advice as to the propriety of revoking licenses. That power is within the discretion of the Mayor, and he will undoubtedly indicate under what circumstances he wants a recommendation made to that effect.

Yours truly,

LEON HORNSTEIN,

First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

License Fee of Dental Laboratories.

March 6, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your recent communication addressed to the Corporation Counsel relative to the laboratories conducted by the Dental Laboratory Association of Chicago, you state that the secretary of said association has submitted the following:

“That the dental laboratories operated by our association members do not make x-ray or other scientific examinations, analyses, determinations, experiments or prepare therapeutic products, nor do they come in contact with the public, but the laboratory is maintained as a part of the dental profession.”

You then request an opinion as to whether or not it is necessary that the Dental Laboratory Association of Chicago obtain a license and pay a fee therefor.

Sections 1841, 1842 and 1843, Article IX of Chapter XXXIX of The Chicago Municipal Code of 1922, are as follows:

“1841. LABORATORY DEFINED.) For the purpose of this article a laboratory is hereby defined to mean any building, place or establishment maintained or operated for the purpose of making medical, bacteriological, pathological, physiological, serological, chemical, industrial, agricultural, physical, dental, optical, veterinary, pharmaceutical, engineering, electrical, x-ray, or other scientific examinations, analyses, determinations, experiments, or for the preparation of therapeutic products.

“1842. LICENSE REQUIRED. No person, firm or corporation shall establish, maintain or operate any laboratory, as defined in the preceding section for conducting examinations, analyses, experiments, determinations, or preparing therapeutic products, for a fee, without first having obtained a license as hereinafter provided.”

"1843. FEES. For the purpose of this section laboratories are classified into three classes, and the annual license fee for each class shall be fixed as follows:

"Class III. A laboratory conducted by a person, firm or corporation in connection with another business where such laboratory does not directly serve the public for pay and which is maintained as a part of his or their or its principal industry or profession. Such laboratories shall be exempt from the payment of a license fee."

Under the provisions of the foregoing ordinance the question involved herein must be determined as a question of fact. I am of the opinion that under the facts submitted, the laboratories in question are not required to pay a license fee.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Filling Station Within 200 Feet of Salvation Army Headquarters.

March 6, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of March 3d requesting the views of this department.

Application has been made to you by Charles S. Dewey to install tanks for a gasoline filling station at 4754-4756 West Kinzie street.

The report of the Superintendent of Maps upon the frontage consent petition accompanying the application

shows a surplus of 23.46 feet, but an inspector from your department, you state, reports that the plot of ground upon which the tanks are to be installed is within 200 feet of a building used by the Salvation Army for church purposes.

You also call our attention to the fact that the frontage consent petition is signed for the Salvation Army by E. F. Marpung, assistant secretary of the Salvation Army, and for the Chicago and Northwestern Railway Company by F. Walters, Vice President.

You wish to be advised whether you would be justified under the law in issuing a permit in this case.

The validity or sufficiency of the frontage consent petition is in no wise affected by the fact that certain consents are signed by agents of the property owners. As we have heretofore advised you (see our opinion to you dated January 20, 1926,) it is not necessary that the authority of an agent to sign such a petition should accompany the petition or appear upon the face of it, and the burden is upon objectors to show that such authority did not exist. (211 Ill. 296, and cases there cited.)

The important question, however, in this case is whether the tanks may be installed within 200 feet of a building used by the Salvation Army for church purposes. The City ordinance forbids the installation of any tank or the storage of gasoline for which a permit is sought "in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot *used* for a school, hospital, church or theater."

The situation presented in this case is very similar to that which existed in the case of the *People of the State of Illinois ex rel. Anna W. Love v. John C. McDonnell, Acting Chief of Fire Prevention and Public Safety of the City of Chicago*, which was decided by the Appellate Court a short time ago.

In that case it was sought to install tanks for a filling station on premises which were within 200 feet of a building

owned by the Salvation Army, which building was divided into stores with apartments over them and in the rear portion thereof was an auditorium which was regularly used for conducting religious services. The Appellate Court in its opinion used the following language:

“The trial judge seems to have decided the case on two erroneous grounds: (1) That the front entrance was more than 200 feet from where the tank or oil filling station was to be put up; and (2) that the entire building was not used exclusively for religious purposes and, therefore, could not be considered a church within the purview of the ordinance.

“As to the first ground it is enough to point out that by the terms of the ordinance the 200 feet is to be measured from ‘the nearest boundary of any such lot,’ etc., and not from a building on it or its entrance.

“As to the second ground, considering that the main object of the ordinance is to prevent danger from fire or explosion to those who may assemble or be in buildings used for schools, hospitals, churches and theaters, we think that any building or part thereof which is used regularly and exclusively for any of these purposes comes within the meaning and object of the ordinance, which is primarily to protect human life in a place used for any of such purposes where a considerable number of persons frequently gather, and such an object is not affected by the mere form or size of the structure.

“That the Salvation Army is a religious organization entitled to the same protection as any other religious organization when its members are assembled in their place of worship is hardly open to discussion. The evidence shows that like other Christian denominations it has a distinct ecclesiastical government, defined doctrines and discipline, and a recognized creed and mode of worship.

“Some of its members have incorporated under the name of Salvation Army for the purpose of handling the physical properties of the organization but that fact has no bearing on the real question whether said auditorium is used for a church or religious purposes.

“We are of the opinion that the issuance of a writ of mandamus would be in disregard of the manifest ob-

ject and purposes of the ordinance as well as of its express terms."

The only difference in principle at all between the case above quoted from and the case now under consideration is the fact that in the former the Salvation Army protested against the installation of tanks within 200 feet of their building, while in the latter the Salvation Army evidently has given its consent to the proposed installation of tanks.

Notwithstanding this consent, however, we are of the opinion that you would have no authority to issue a permit for the installation of these tanks "in any lot or plot of ground where any of the boundaries of any such lot or plot of ground are within 200 feet of the nearest boundary of any lot or plot used for a school, hospital, church or theater.

We have heretofore written the following concerning a somewhat similar case, and we think it is peculiarly applicable to the case now under discussion:

"We do not believe it is the law that where there is an absolute prohibition in an ordinance as in this case, providing no conditions that might waive the prohibition, that the church authorities have the power to waive it. The prohibition is there for the benefit of the men, women and children that attend the church, to safeguard them from the danger of fire, accident, etc., and to prevent them from being disturbed while in attendance at divine services.

"We do not think it will be seriously contended that a garage may be erected next to a public school because the Board of Education may consent to its erection there; or that an oil station may be erected next to a theater, contrary to a similar prohibition in the ordinances, upon the consent of the theater to its erection; or that the authorities of a hospital may waive the prohibition and permit the erection of a garage within 200 feet of the hospital building; or if an ordinance provided that no liquor be sold within a mile of a church that the church authorities could waive the prohibition and make it lawful to sell liquor within a mile of the church."

In view of the above decision of the Appellate Court, we feel that you would be without authority to issue a permit to install tanks for a gasoline filling station in this case.

Very truly yours,

WILLIAM L. SULLIVAN,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,

Corporation Counsel.

Merger of Claims for Inspection Fees.

March 5, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

In your communication addressed to the Corporation Counsel relating to divers requests from the City Comptroller for the cancellation of sundry warrants for collection on the ground that the amounts involved are small and would not warrant a lawsuit, you request an opinion as to the propriety of combining in one action all claims against specific premises, and also the time limit within which such actions could be brought.

In and by Section 15, Paragraph 16, Chapter 85, Illinois Revised Statutes (Cahill), 1925, it is provided:

“Actions on unwritten contracts, expressed or implied * * * and all civil actions not otherwise provided for, shall be commenced within five years after the cause of action accrued.”

Municipal corporations, in matters involving private rights, as distinguished from public ones, are subject to limitation laws (*Piatt County v. Goodell*, 97 Ill. 84).

Statutes of limitation do not run against local governmental agencies, such as counties, cities, towns, etc., in respect to governmental affairs affecting the general public,

unless expressly included within the terms of the statute; but as to matters involving private rights they are subject to statutes of limitation to the same extent as individuals (*People v. Davis*, 157 Ill. App. 438).

An action of debt for a penalty for the violation of a municipal ordinance is purely a civil action, and may be brought within two years after the right of action accrues (*City of Chicago v. Enright*, 27 Ill. App. 559).

Concerning the joinder of separate causes of action in one proceeding, our Supreme Court in the early case of *Hays v. Borders*, 1 Gilman (6 Ill.) 46, at page 51, said:

“It is objected to the declaration that it is defective by reason of a misjoinder of counts and causes of action, in this, that it contains counts for a penalty founded on statute, and others for such damages as could have been recovered at common law. The result of authorities on the subject of the joinder of different forms of action is said to be that ‘when the same plea may be pleaded and the same judgment given on all the counts of the declaration’; or, ‘whenever the causes of action are of the same nature, and may properly be the subject of counts in the same species of action, they may be joined; otherwise they can not.’ 1 Chitty’s Pl. 229; 1 Tidd’s Prac. 11. Tested by these rules the declaration is not obnoxious to the objection urged against it.”

A count on a preliminary note, and a count for goods, wares and merchandise sold and delivered, may be joined in the same declaration (*Bogardus v. Trial*, 1 Scam. [Ill.] 63).

By reason of the foregoing I am of the opinion that all claims in favor of the City of Chicago against an individual, co-partnership or corporation for moneys due the City for inspection fees for a period within five years next prior to filing suit therefor, can be joined in one action against such individual, co-partnership or corporation.

Respectfully submitted,

ROY S. GASKILL,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,

Corporation Counsel.

Proposed Lighting of Randolph Street.

March 8, 1926.

HON. WILLIAM E. DEVER, Mayor.

Dear Sir:

You turned over to this department copy of a letter sent to you by the president of the Randolph Street Lighting Association outlining plans for the lighting of Randolph street, together with a request for an opinion as to the legality of the City's lighting the City Hall and Public Library in the manner suggested.

The entire matter of street lighting is within the control of the City Council. Clause 11 of Section 1 of Article V of the Cities and Villages Act gives the council authority to provide for the lighting of streets.

We are therefore of the opinion that such parts of Randolph street as are in front of the City Hall or the Public Library may be lighted in any way that the City Council may determine. The lighting of the balance of the street must also be provided for by the City Council. In other words, neither the residents nor owners of property on a street can light the street to suit themselves, but the work must be done in conformity with an ordinance of the City Council.

This department had occasion to pass on the question of the initial cost of an installation of lights to be paid for by private parties in the case of Dearborn street lighting. Our opinion on the validity of a contract about to be entered into with the Dearborn Street Improvement Association appears at page 1096 of the Opinions of the Corporation Counsel and Assistants from April 1, 1911, to December 31, 1912. The following excerpt is taken from that opinion:

"As to the first of these questions there can be no doubt concerning the right of the city to provide for

street lighting in any manner which may be regarded as desirable, either by doing the work itself or by contracting with other parties for having it done. It is also within the power of the city council to specify a larger or smaller number of lights for the street, the only limitation on this being that local benefits are to be properly assessed against the property improved."

We recommended in our opinion that a bond should be required for the faithful performance of the proposed agreement. We are not advised as to whether or not the plan adopted at that time worked out successfully. There can, however, be no doubt as to the right of the City to light its streets in such manner as it deems expedient.

Yours truly,

LEON HORNSTEIN,

Approved: *First Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Proper Signing of Regulations Passed by the Board of Health.

March 9, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

We have your letter in which you inquire whether regulations passed by the Board of Health on the recommendation of the Commissioner of Health are to be signed by the Board of Health in its entirety or by an officer of the Board of Health or by the Commissioner of Health. This question relates to the provisions of the ordinance creating the Board of Health and defining its powers, passed on January 13, 1926, and appearing on pages 2116 and 2117 of the Journal of the Proceedings of the City Council of that date.

There is no provision in the said ordinance which expressly requires the signing of regulations adopted by such board. Hence, there is no officer named for that purpose. It is the common practice, however, for the presiding officer and the clerk or secretary of all boards and legislative bodies to sign official documents that emanate therefrom. In fact, the practice may be said to be universal unless there is special provision in the law for legislative acts, rules or regulations to go into effect without signatures.

The ordinance in question provides that the Board of Health shall elect annually from its own members a president and such other officers as the board shall determine by its rules. While the authority to make rules may carry with it power to designate a member or officer of the board, who shall sign all regulations that are passed, in order to make them official, we believe the better practice would be to adopt the usual procedure by providing in the rules that the president and secretary of the board shall sign all documents in order to give them official standing.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Injunction Relating to Dry Cleaning Establishments.

March 9, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge receipt of your communication of February 26th with enclosure of copies of letters from

Albert H. Veeder, former assistant corporation counsel, dated March 2, 1922, and former Chief of Fire Prevention Bureau, John C. McDonnell, dated June 19, 1922.

Mr. Veeder's letter is addressed to John C. McDonnell, former Chief of the Bureau of Fire Prevention and Public Safety, and advises the bureau that on February 28, 1922, Judge Ira B. Ryner, in the case of *David H. Wolf et al. v. City of Chicago et al.*, had entered an order restraining William Hale Thompson, then Mayor of the City, and others, from in any wise interfering with the complainants in their operation of a dry cleaning establishment located at 4631-33 North Crawford avenue.

The letter dated June 19, 1922, signed by J. C. McDonnell, chief of the Bureau of Fire Prevention and Public Safety, is directed to former Corporation Counsel Ettelson and acknowledges Mr. Veeder's letter of March 2d, and further declares that the Bureau of Fire Prevention was obeying the injunctinal order, but that the complainants had requested a dry cleaner's license from the department for the operation of their plant, and further states that the plant was presumably being operated in violation of the City ordinances, and if it would continue to so operate because of the injunction the City would lose the license fee. The letter concludes with the query, "Is the injunction still in force? If so, what should I do about approving or disapproving the application for a license?"

You advise us in your letter to this department of February 26th that you have never received an answer to your questions contained in your letter of June 19, 1922, and further state that the benzine room or dry cleaning room of the dry cleaning plant in question is about 16 feet distance from a residence and about 7 feet from a frame garage, and that other details in this plant do not conform to the fire prevention ordinances.

Undoubtedly you advise us of the distance of the dry cleaning room from the residence and the frame garage because of the provisions contained in Paragraph (b) of Sec-

tion 1416 of The Chicago Municipal Code (1922), which is in words and figures as follows:

“Every such building shall be detached and at least 50 feet from any other building or structure or to the line of adjoining property which may be built upon; provided, however, that the use of any building in which a dry cleaning business was carried on prior to July 22, 1912, may be continued where such building is separated from all other buildings by a fire wall, with no openings into any adjoining building; and further provided, that any building previously used for dry cleaning, but not so occupied or used for such purposes for a period of three consecutive months immediately prior to the passage of this ordinance, shall not again be used for the business of dry cleaning unless all requirements governing new buildings or dry cleaning plants have been complied with.”

As you have already been informed by this department in previous opinions, the Appellate Court in the case of *Klever Shampay Karpel Kleaners, Inc. v. City of Chicago et al.*, No. 30323, has declared the 50-foot clearance provision of the Fire Prevention Ordinance invalid and illegal. Consequently, the fact that the dry cleaning room under discussion is merely 16 feet distance from a residence does not in itself, at this date, because of the Appellate Court decision heretofore referred to, constitute what may now be termed a violation of the ordinance.

You further advise us, however, that “other details in this plant do not conform to the fire prevention ordinance.” You have not specified what these details are, and therefore we assume that they are material violations of the fire prevention ordinance. If this be the fact, then you may still continue to refuse to issue a license for the plant in question.

Concerning your query as to whether the injunction entered in this case is still in force, an examination of the record reveals these pertinent facts:

1. An order entered in this case (B-82759) on February 28, 1922, signed by Judge Ryner containing the following recital:

“It is therefore ordered that * * * William Hale Thompson, Mayor * * * and Charles C. Fitzmorris, Chief of Police * * * their agents, servants and employees, be restrained from in any wise interfering with the complainants * * * in the operation and prosecution of a dry cleaning establishment at 4631-4633 N. Crawford Avenue until the further order of this court * * *.”

2. An order entered on May 27, 1924, signed by Judge Scanlan in part as follows:

“It is therefore ordered, adjudged and decreed that the defendants and their agents, attorneys and servants be, and each of them hereby is *permanently* enjoined and restrained from in any wise interfering with the complainants in the operation and prosecution of the certain dry cleaning establishment located at 4631-4633 N. Crawford Avenue in the City of Chicago * * * as the said dry cleaning establishment is constituted at the date of the entry of this order.”

In view of the language contained in the orders above set out, especially in the order of May 27, 1924, we must advise you that the injunction is still in force.

Very truly yours,

BARNET HODES,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Period of Time for Which Power of Attorney Is in Effect.

March 9, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

This will acknowledge receipt of your communication of March 2d.

You advise us that there are on file in the City Paymaster's office several hundred powers of attorney and that some of these instruments are dated back several years.

You wish to be advised as to whether these powers of attorney expire because of operation of law or otherwise within a given or stated time. In other words, as to whether there is "any limit to the length of time this form of power of attorney can legally operate."

You attach a form of the power of attorney in question to your letter, which is as follows:

“KNOW ALL MEN BY THESE PRESENTS, That.....
.....do hereby make, constitute, and appoint,
irrevocably.....of the City of Chicago, County of
Cook, State of Illinois, my true and lawful Attorney for
.....and in.....name and on my behalf to receive,
collect and receipt for all sums of money, which are or
shall become due, owing and belonging to me by the City
of Chicago, upon or growing out of.....

and my said attorney is hereby fully authorized and empowered to do and perform all necessary acts and to sign all necessary papers for the said receipt and collection, and I hereby expressly waive the right of revoking this power of attorney. Any revocation of this power of attorney to be binding upon the City of Chicago, shall only be made by an endorsement of such revocation by the City Comptroller.

In witness whereof I have hereunto set my hand and
seal this.....day of.....A. D. 192...
Sign here.....”

The reverse side of this power of attorney is as follows:

“STATE OF ILLINOIS }
County of Cook. { ss.

I, a Notary Public in and for said County, in the State aforesaid, do hereby certify that personally known to me to be the same person whose name.....subscribed to the foregoing instrument appeared before me this day in person

and acknowledged that.....signed, sealed and delivered the said instrument as.....free and voluntary act for the uses and purposes therein set forth.

Given under my hand and Notarial seal this..... day ofA. D. 192...

.....
Notary Public."

It will be observed in reading this power of attorney that the following language is used:

"I hereby expressly waive the right of revoking this power of attorney. Any revocation of this power of attorney to be binding upon the City of Chicago, shall only be made by an endorsement of such revocation by the City Comptroller."

It is apparent from this language that the power of attorney in question can not be considered to operate merely for a specified or definite time. Its legal life has no delimitation of time so far as its operation is concerned and it can only be revoked in the manner declared by its own terms.

"Once executed, the power of attorney becomes the property of the agent to whom it is issued, and he has a right to keep it as evidence of the authority under which he acts until it is recalled by the principal. 2 C. J., page 454, citing *Pridmore v. Harrison*, 1 C. & K. 613, 47. ECL 613; *Hibberd v. Knight*, 2 Exch. 11."

Our opinion therefore is that there is no definite length of time in which this form of power of attorney can be considered to legally operate.

Very truly yours,

BARNET HODES,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Limitation as to Criminal Prosecutions Relating to Handling of Pension Fund.

March 11, 1926.

THE RETIREMENT BOARD, Policemen's Annuity & Benefit
Fund.

Gentlemen :

Your letter of March 8th requesting an opinion as to the application of the Statute of Limitations to proposed criminal prosecutions authorized by your Honorable Body, which request was embodied in a letter from George C. Sikes, director, to the Corporation Counsel, was referred to me. The following is submitted :

I.

Paragraph 1 of "An Act to define and punish conspiracies in the State of Illinois," as amended by Act approved June 28, 1919 (Smith-Hurd Illinois Revised Statutes, Chapter 38, Section 140), provides as follows :

"That if two or more persons conspire either to commit any offense against the State of Illinois, or any county, incorporated city, town or township thereof, or to defraud the State of Illinois, or any county, incorporated city, village, town or township thereof, in any manner, or for any purpose, and one or more of such parties, do any act to effect (affect) the object of the conspiracy, all parties to such conspiracy shall be liable to a penalty of not less than one hundred dollars, and not more than five thousand dollars, and to be imprisoned in the penitentiary for a term of not less than one year nor more than two years or imprisonment in the County jail for any period not exceeding two years. Provided, however, this Act shall not be construed to modify or repeal any other law in force in this State."

An offense punishable by imprisonment in the penitentiary is a felony.

Rev. Stat., Chap. 38, Par. 585.

An indictment for a felony can be voted at any time within three years next after the commission of the crime (Rev. Stat., Chap. 38, Par. 630), and the Statute of Limitations starts to run on the date of the commission of the last overt act affecting the conspiracy (*Ochs v. People*, 124 Ill. 399).

While we advise you herein that you have the right to begin a prosecution within three years after the commission of the last overt act in connection with the conspiracies mentioned, such construction of the law is open to some doubt by reason of decisions of the Supreme Court of this state on the question of whether a given crime is to be classed as a felony or a misdemeanor. In the case of *Lamkin v. People*, 94 Ill. 501, it was held that when an offense may be punished by imprisonment in the penitentiary, or by fine only, in the discretion of the court or jury, it is only a misdemeanor, and the eighteen months' limitation within which prosecution for misdemeanors may be started applies to it. Again in the case of *Baits v. People*, 123 Ill. 428, it was held that the offenses created by the conspiracy act which were made part of Section 46 of the Criminal Code, although they prescribe fines, and imprisonment either in the penitentiary or the county jail, were misdemeanors and the eighteen months' limitation applies to them. The same is true of the case of *Herman v. People*, 131 Ill. 493, which passes on the same sections of the Criminal Code. All these cases hold that the ordinary conspiracy charges come within the definition of misdemeanors. The distinction between the sections of the Criminal Code under which those cases were prosecuted and the one under which it would be necessary to prosecute in the present instance lies in the fact that the Act of 1877 defining conspiracies against municipalities and against the People of the State (as amended in 1919) provides for punishment of both fine and imprisonment in the penitentiary, with an

alternative of imprisonment in the county jail. The only light that can be obtained on the point that there is such a distinction is the historical review showing the distinctions between felonies and misdemeanors which appears in the case of *People v. Connors*, 301 Ill. 112.

II.

Under the present Policemen's Annuity and Benefit Fund Act, policemen contributors are entitled to all their contributions and salary deductions made subsequent to January 1, 1922, by virtue of the act itself.

Prior to January 1, 1922, all the money in the Police Pension Fund belonged to and was the money of the City of Chicago. While that fund was in part made up from deductions made from the salaries of the members of the Police Department, such salary deductions were not the moneys of the respective policemen, but were and continued to be the moneys of the City of Chicago. Policemen were not entitled and are not now entitled to a refund of any salary deductions made from their salaries prior to January 1, 1922.

a.

In speaking of salary deductions made prior to January 1, 1922, the Supreme Court of the State of Illinois, in the case of *Hughes v. Traeger* (264 Ill. 612, 616), says:

"The effect of the law was to reduce the salary which the complainant would receive two dollars a month, but he was not thereby deprived of his property, for he had no property in his unearned salary..... The two dollars a month deducted from the pay of each employee does not become the property of such employee and cannot be controlled or disposed of by him."

b.

In the case of *Pecoy v. City of Chicago*, 265 Ill. 78, the Supreme Court of Illinois, in passing upon the question of pension contributions made prior to January 1, 1922, to the Police Pension Fund, on page 80 of said volume, says:

“Pensions are in the nature of bounties of the government, which it has the right to give, withhold, distribute or recall at its discretion. This rule is not changed by the circumstance that plaintiff in error claims to have contributed one per cent of his salary to such fund. The alleged contribution was not, in fact, a payment by him. He accepted the appointment of police patrolman with the knowledge that one per cent would be deducted each month and placed in the pension fund. The money was never paid to him, and the city simply transferred one per cent of the salary from one fund to another, and continued to hold it as a special fund to meet the disbursements under the Police Pension Law.”

c.

It is quite evident from the above holdings of the Supreme Court that the moneys in the Police Pension Fund prior to January 1, 1922, were exclusively public moneys and exclusively the money of the City of Chicago. The fact that the moneys were designated as a “Police Pension Fund” is of no more consequence than if they were called a “Water Fund” or “Traction Fund”; the moneys still were the moneys of the City of Chicago.

III.

Any conspiracy having for its purpose the defrauding of the City of Chicago is indictable at any time within three years from the date such conspiracy became effective, or from the date on which the money of which the City was sought to be defrauded was actually paid out of the funds belonging to the City of Chicago—in this case, the Police Pension Fund as it existed prior to January 1, 1922.

The moneys paid out of the Police Pension Fund in the nature of back pension payments in the cases referred to in the letter of Mr. Sikes covered a period of time prior to January 1, 1922, as well as a period of time subsequent to January 1, 1922.

Waiving, for the present, the question of what portion of the money represented by the period of time subsequent

to January 1, 1922, belonged to and was the money of the City and what portion was the money of the pensioner, there is no question that the entire amount of money represented by the period prior to January 1, 1922, was the money of the City of Chicago, and as to such moneys paid out in the respective cases there can be no question that such money was the money of the City of Chicago, and any conspiracy which resulted in the improper obtaining of the possession of such moneys was and continued to be an indictable offense during a period of three years from and after the date such moneys were improperly obtained from the pension fund.

Under the statute hereinabove quoted, the conspiracy to obtain the money is in itself an indictable offense and the procuring of the money resulting from such conspiracy is a fact evidencing the consummation of the conspiracy.

I V .

In the matter of the cases mentioned by Mr. Sikes in his letter, any evidence tending to establish a conspiracy can be presented to the Grand Jury for the finding of an indictment as follows:

(a) In the case of Mary Carroll in which \$2420.00 was alleged to have been paid August 23rd, 1923, such evidence may be presented on or before August 22nd, 1926, and be within the statute of limitations;

(b) In the case of Mary Pollard in which \$3727.42 was alleged to have been paid June 20th, 1923, such evidence may be presented on or before June 19th, 1926, and be within the statute of limitations;

(c) In the case of Annie Doyle in which \$3979.59 was alleged to have been paid March 16th, 1923, such evidence may be presented on or before March 15th, 1926.

V .

I am of the opinion that, in all of the above cases, the Statute of Limitations is not fixed by the date of issuance of the check, but by the date on which the check is cashed, so

that if the respective amounts were really obtained from the Pension Fund subsequent to the dates hereinabove stated then such indictment can be found at any time within three years from the date on which said amount was so obtained.

In order to avoid the possible question as to how much of the money so obtained on the respective checks belonged to the City and how much was (under the present act) rightfully the money of the person in whose name the check was issued, I would suggest that the actuary be requested to compute the amount of money in each check which was paid on account of a period of service prior to January 1, 1922, and, therefore, payable out of the old pension fund.

I would also suggest to your Honorable Body that your Honorable Body have the evidence in the strongest case prepared at once and submitted without delay to the Grand Jury, and that the other cases follow thereafter as nearly as may be in the order of their respective strength of proof. If, however, there is not sufficient proof to establish a conspiracy in any one case but sufficient proof to establish a conspiracy in a number of grouped cases where the elements or methods have characteristics in common, then the indictment should be sought within three years after the latest date on which moneys belonging to the City were obtained from the Pension Fund in said grouped cases as a result of such conspiracy.

Respectfully,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Jurisdiction of City Over Work in Grant Park in Vicinity of Van Buren Street.

March 18, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir :

Your communication addressed to the Corporation Counsel relative to certain work now under way in Grant Park in the vicinity of Van Buren street has been referred to the undersigned for consideration and reply.

Specifically you ask :

1. Has the City any jurisdiction over the extensions of streets east of Michigan boulevard between Randolph street and Roosevelt road?

2. Will the City be liable for damages due to closing the extensions of Van Buren street even though a new street entrance (to the plaza opposite Congress street) is built approximately 200 feet south of Van Buren street?

The history of the title of the City of Chicago to the lands in what is known as Grant Park is given in several well known cases wherein Montgomery Ward prevented the erection of buildings on said Grant Park. See *City of Chicago v. Montgomery Ward*, 169 Ill. 392; *Bliss v. Ward*, 198 Ill. 104; *Ward v. Field Museum*, 242 Ill. 496.

All of the above cases were predicated on the proposition that the fee of the lands east of Michigan avenue between Randolph street and Park Row was in the City of Chicago.

On July 27, 1896, the City Council passed an ordinance giving consent to the South Park Commissioners to take, regulate, control and govern certain portions of the park. This ordinance was accepted by the park commissioners by a resolution October 4, 1896. The General Assembly passed

an act approved June 11, 1897, reciting the passage of the ordinance and plans for a parade ground and armory. This was prevented by the decision in *Bliss v. Ward*, 198 Ill. 104. On April 24, 1899, the General Assembly passed an act reciting that the title to the land in question was still in the State, and enacted that the park should be called Grant Park. In the year 1901 the above act was amended and part of the park was conveyed to the South Park Commissioners. On May 14, 1903, the whole of Grant Park, bounded on the north by Randolph street, on the south by Park Row and on the east by the lake, was conveyed to the South Park Commissioners to be held, managed and controlled by said commissioners in the same manner as other parks then under their control. The question, therefore, of the respective rights of the City of Chicago and of the South Park Commissioners in and to the area known as Grant Park depends upon the respective titles of each, and the Supreme Court of the United States in the case of *People ex rel. Attorney General v. Illinois Central Railroad Co. and the City of Chicago*, 146 U. S. 387, decided that the title in fee was in the City of Chicago; therefore it continues to remain in the City despite the acts of the legislature, until, and unless the City has divested itself of such title. Hence, the title of the City being in fee, the South Park Commissioners' jurisdiction therein is limited to the maintenance and control of the area in question for park purposes.

In and by an ordinance passed by the City Council on July 21, 1919, commonly known as the Lake Front Improvement Ordinance (Council proceedings, page 969), it is provided in and by Paragraph (d) of Article VI thereof as follows:

“The City hereby grants to the Commissioners the tract of land abutting on the shore of Lake Michigan known as East End Park, and bounded approximately on the north by Hyde Park Boulevard” (and also certain other property therein described) “also insofar as it has lawful power and authority to do so, all other lands and submerged and reclaimed lands owned by the City and abutting on the shore of Lake Michigan be-

tween the Chicago River and East Sixty Seventh Street, extended east, (except the land and submerged and reclaimed land now occupied by the Thirty-ninth Street pumping station and except the land and submerged and reclaimed land herein reserved for Harbor District No. 3), together with any and all riparian rights which the City may have between said Chicago River and said East Sixty-seventh Street, extended east. If it shall appear that the City lacks power to grant to the Commissioners any of said land, submerged or reclaimed lands or riparian rights, the City agrees hereafter to join with the Commissioners in a request to the General Assembly of the State of Illinois to pass such legislation as may be necessary to confer upon the City such power." (Italics ours.)

Any doubt as to the power of the City to make the foregoing grants to the Commissioners as recited in said ordinance has been removed by an act of the legislature entitled "An Act concerning the powers of certain municipal corporations with respect to real estate" approved July 2, 1925 (Chapter 24, Paragraph 652, Illinois Revised Statutes [Cahill], 1925), Section 2 of which provides as follows:

"If the territory of any municipality shall be wholly within, co-extensive with, or partly within and partly without the corporate limits of any other municipality, and the first mentioned municipality (herein called 'transferee municipality'), shall by ordinance declare that it is necessary or convenient for it to use, occupy or improve any real estate held by the last mentioned municipality (herein called the 'transferor municipality'), in the making of any public improvement or for any public purpose, the corporate authorities of the transferor municipality shall have the power to transfer all of the right, title and interest held by it immediately prior to such transfer, in and to such real estate, whether located within or without either or both of said municipalities, to the transferee municipality upon such terms as may be agreed upon by the corporate authorities of both municipalities. * * *"

Subparagraph (c) of Section 1 of said Paragraph 652 of said act provides that the term "municipality," "shall mean and include a City, incorporated town or village

whether organized under a special charter or under the General Act, or whether operating under the commission or managerial form of government, county, school districts and park districts or park commissioners.”

Section 31 of Article VIII of said Lake Front Ordinance provides in part as follows:

“All the work required or authorized to be done by the Central Company or the Commissioners, upon or in connection with the public streets of the City, shall be under the superintendence and subject to the inspection and approval of the Commissioner of Public Works of the City, and its cost, including the cost of inspection shall be paid by the Central Company, or the Commissioners as the case may require.”

Section 34 of the foregoing ordinance is as follows:

“This ordinance and all of its provisions, when accepted by the Commissioners, and the Central Company, and the railroad companies mentioned in Section 36 hereof, shall be taken and construed as a contract between the City, the Commissioners, the Central Company and said railroad companies, and by each one of them, with each and all of the others, that each will assent to, authorize and permit all things to be done which any one of said parties is required, authorized or permitted to do by the conditions, provisions and terms of this ordinance, and that each will, on its part, do all things it may be required to do for the proper fulfillment of the purposes of this ordinance; * * *”

From a careful consideration of the foregoing and of the statutory powers of the South Park Commissioners, we are of the opinion that the commissioners are without authority to close or abandon Van Buren street as a public highway without the consent of the City. We find nothing in the statute authorizing the vacation of public streets by park commissioners. By reason of the fact that the title, care, management and control of Grant Park for park purposes has been vested in the South Park Commissioners, we believe that the City of Chicago, in order to protect itself against any claims for damages which might arise due to the pro-

posed closing of Van Buren street through the park should, at the request of the commissioners, take the necessary steps for the vacation of said street in accordance with the provisions of Chapter 145 of the Illinois Revised Statutes, if the City Council "shall determine that public interests will be subserved by vacating" such street.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Jurisdiction Over Pipes for Conducting Rain Water from Roofs.

March 12, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of March 11th requesting our views as to which department of the City government is charged with the enforcement of Paragraph (c) of Section 805 of The Chicago Municipal Code of 1922, reading as follows:

"(c) The water from all roofs shall be carried to the sewer in metal conductor pipes. Every such conductor shall be continually maintained in good condition, and if such conductors are within the exterior walls, they shall be screwed-joint iron or steel pipe, or of cast iron pipe with calked joints."

About six months ago, you state, you had a survey made of the work done by the Bureau of Sanitary Engineering of the Department of Health to ascertain what part of its work

had a bearing on public health, and at that time it was shown that a large amount of its time was devoted to correcting defects in eaves troughs and down spouts.

“In practically none of these cases,” you add, “was there any danger to public health, the damage, if any, being to the building itself and to the foundations of the adjoining building.”

Section 805 is a part of Chapter XVII of The Chicago Municipal Code. This chapter is entitled “Buildings,” and contains the so-called Building Code of the City of Chicago. Also the said Chapter XVII establishes the Department of Buildings and provides in Paragraph (c) of Section 399 that, “It shall be the duty of said commissioner and his assistants to enforce all ordinances relating to the erection, construction, alteration, repair, removal or the safety of buildings.”

The requirements of the said paragraph (c) of Section 805 are merely that metal conductor pipes must be used in carrying water from roofs of buildings to the sewer; that such pipes shall be maintained continually in good condition; and that if the pipes are within the exterior walls, they shall be screwed-joint iron or steel pipe, or of cast iron pipe with calked joints.

These requirements, we think, are clearly matters relating to the erection, construction, alteration or repair of buildings, and as such under the ordinances the Department of Buildings is charged with their enforcement.

Accordingly, it is our opinion that the Department of Buildings is charged with the enforcement of Paragraph (c) of Section 805 of The Chicago Municipal Code of 1922.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Proposed Ordinance Authorizing Marine Railway in
North Branch at Roscoe Street.**

March 18, 1926.

TO THE HONORABLE, the Council Committee on Harbors,
Wharves and Bridges.

Gentlemen:

The order of the City Council of March 3, 1926, directing the Corporation Counsel to render an opinion to your committee as to the form and advisability of a certain ordinance authorizing the construction and maintenance of a marine railway built into the waters of the north branch of the Chicago river at Roscoe street by the Great Lakes Boat Building Corporation, together with copy of the proposed ordinance and a letter from the Commissioner of Public Works to His Honor the Mayor with relation to the same, has been referred to the undersigned for consideration and reply.

A consideration of the proposed ordinance discloses numerous defects therein which might be briefly enumerated as follows:

1. The proposed ordinance purports to grant a special and exclusive privilege to the corporation named.

2. There is nothing to indicate whether or not such privilege if granted will or will not materially interfere with the present or future public use of the channel of the Chicago river at the point indicated.

3. The rights of the public as to future use of the Chicago river are in no way safeguarded by the proposed ordinance.

4. There is no provision in the proposed ordinance for its revocation by the City Council without recourse by the corporation.

5. There is no provision in said ordinance requiring the removal of such proposed construction in case of the repeal of said ordinance.

6. The proposed ordinance fails to disclose any benefit or interest inuring to the City by reason of the granting of the privilege therein designated.

7. There is no provision for compensation of any kind to the City of Chicago for the privileges sought to be obtained.

8. The ordinance purports to grant a perpetual right to the corporation to build the encroachment in question.

9. There is no adequate provision for indemnifying the City against claims that may arise by reason of the construction and operation of said encroachment, the indemnifying clause being limited in its effect to the repeal of the ordinance.

In *People v. Field & Co.*, 266 Ill. 609, the court had before it for consideration a certain ordinance granting the right to Field & Company to construct tunnels under Washington street connecting the basements and sub-basements of its buildings on either side of the street, and the court in that case held that the ordinance in question granting such right to construct tunnels connecting the basements of said buildings for the use of employes and the public in passing from one building to the other and for transporting goods was not *ultra vires* or unconstitutional as granting a special and exclusive privilege to the corporation where there was no harmful interference with the present public use of such space, and the rights of the public as to future use being amply safeguarded by the ordinance, which provided for its revocation at any time by the City Council without recourse by the corporation, which would then be required to remove the tunnels and restore conditions at its own expense.

The proposed ordinance now in question goes much further than did the ordinance in the *Field* case, and purports to grant in perpetuity the right to the Great Lakes Boat Building Corporation to construct and maintain a substantial encroachment on the premises in question.

The passage of this ordinance affecting as it necessarily will what has been designated by Congress as "Navigable Waters of the United States," it will be necessary, in my opinion, even though such an ordinance be passed, that the corporation in question obtain a permit from the Department of Waterways of the State of Illinois, and also a permit from the Federal Government, to maintain and operate the encroachment in question.

As to the advisability of passing such an ordinance, we submit that such question is primarily for the consideration of the City Council. However, we believe that owing to the normal growth and expansion of the City, the granting of special privileges such as are contemplated in this proposed ordinance should not be looked upon with favor by the City Council.

We, therefore, return herewith the copy of the ordinance submitted, without our approval.

Respectfully submitted,

ROY S. GASKILL,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Legality of Imposing Fines on Firemen for Violation of Rules of the Department.

March 18, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

The request made by you by letter of date of August 29th ult., accompanied by the letter of C. N. Curry, acting department secretary of the Fire Department, for an opinion as to the legality of the imposition of fines and penalties by division fire marshals trying firemen for violation of the

rules of the department under the law in force before the adoption of the Civil Service Act, was recently referred to me for answer.

I find on inquiry that the amount of the "fine" exacted from the fireman suspended was the sum the salary amounted to for the time he was suspended. Technically, this was a forfeiture rather than a fine. The latter is considered a pecuniary punishment.

The courts have decided in a number of cases that:

"* * * employees or officers of the city who were in service when the civil service act became operative are known as holdovers, and are not within the protection afforded by section 12 of the civil service act which regulates the manner of discharge of persons holding as appointees under the act, though 'his name has for a time been certified by the civil service commissioners to the comptroller and by him to the city treasurer.'"

McNeill v. Chicago et al., 93 Ill. App., affirmed 212 Ill. 481.

Stott v. Chicago et al., 98 Ill. App. 105, affirmed 205 Ill. 281.

People ex rel Kisselberg v. Chicago et al., 104 Ill. App. 250, affirmed 210 Ill. 479.

Kenneally v. Chicago et al., 220 Ill. 485, affirmed Appellate Court.

People v. Chicago et al., 104 App. 250, affirmed 210 Ill. 250.

The Civil Service Law and the rules of the commission not being applicable to the case you present, the forfeitures imposed by the rules of the Fire Department if not excessive are permitted by general law, and we therefore advise that the office of the Comptroller should make the deduction as requested by the Fire Department.

Very respectfully yours,

CORA B. HIRTZEL,

Approved:

Assistant Corporation Counsel.

FRANCIS X. BUSCH,
Corporation Counsel.

Revenue Stamps on Powers of Attorney.

March 19, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have your request of March 18, 1926, desiring to be advised as to whether there is any time set by law for the discontinuation of the practice of requiring revenue stamps on powers of attorney.

The Revenue Act of 1926, Title XII, General Provisions, repeals Section 746, Section 1200, reading as follows:

"Section 746, Section 1200, (a). The following parts of the Revenue Act of 1924 are repealed, to take effect (except as otherwise provided in this Act) upon the enactment of this Act, subject to the limitations provided in subdivision (b):"

The 11th sub-paragraph reads as follows:

"Section 756. Title VIII (called 'Stamp Taxes'), effective on the expiration of thirty days after the enactment of this Act:"

The 1924 Revenue Act, Title VIII, Stamp Taxes, Schedule A, Paragraph 10, reads as follows:

"10. Power of attorney granting authority to do or perform some act for or in behalf of the grantor, which authority is not otherwise vested in the grantee, 25 cents."

The Federal Revenue Act of 1926 was approved and signed by the President February 26, 1926. Thirty days thereafter, as provided in the act, sets March 29th as the day after which no revenue stamps will be required on powers of attorney.

Yours very truly,

FRANK T. HUENING,

Approved: *Assistant Corporation Counsel.*

FRANCIS X. BUSCH,
Corporation Counsel.

Separate Funds in Police Department and Fire Department.

March 19, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

We have your letter of recent date, in which you state that the Committee on Finance passed a motion to the effect that in the future moneys received from the sale of property purchased for or used by the Police Department and the Fire Department should be kept in separate funds to be used for the purchase of property for the use of these respective departments. You ask to be advised whether the City Council can legally set up such special funds from moneys derived from the sources indicated and control the purpose for which same may be expended.

There is nothing in the law which prohibits the setting up of special funds in any way that the City Council may see fit to prescribe. In fact, the Comptroller, without any action on the part of the City Council, may create as many accounting funds as he sees fit. We do not understand your question, however, to go to this point, but rather assume from the nature of same that you want to know whether the City Council can at any time of the year draw on these special funds for expenditures for the particular department for which they are reserved.

The City Council cannot draw on such special funds at any other time than the times prescribed by statute for making appropriations. That is to say, it can make an appropriation from such a fund at the time of passing the annual appropriation bill, and it can pass an additional appropriation ordinance at any time within the first six months of the fiscal year by which it draws from such funds. This matter

was definitely settled by the case of *People v. Sergel*, 269 Ill. 619, from which we quote the following:

"Paragraph 90 prohibits the council or board of trustees, or any officer or department of the corporation, from adding to the corporate expenditures in any one year, anything above the amount provided for in the annual appropriation bill of that year, except as is therein specially provided. Paragraph 91 provides that no expense shall be incurred by any officer or department of the corporation unless an appropriation shall have been previously made concerning such expense.

* * * * *

Appellee's contention is, that, construing these paragraphs together, they were intended to require that the appropriation ordinance passed during the first quarter of the fiscal year should appropriate only the revenues and funds of the corporation received from taxation; that as to receipts from miscellaneous sources they may be appropriated for the payment of current expenses at any time during the fiscal year. If this position is correct then the annual appropriation ordinance passed during the first quarter of the fiscal year and the tax levy would be for the same amount, or, at least, there would be no necessity for the appropriation exceeding the amount of the tax levy. The provisions of the statute referred to are mandatory and have been held to have been enacted for the protection of the tax-payer.

* * * * *

Nowhere in the statute do we find any language warranting the inference that the appropriations required to be made the first quarter of the fiscal year were limited to funds collected by taxation, and as was said in *City of Chicago v. Nichols* (177 Ill. 97), we have neither power nor inclination to limit the reasonable construction and application of the statute. 'If exceptions to such prohibition other than those found in the statute ought to be made, the legislative power should be invoked. Courts have power to construe and enforce statutes but not to enact or amend them.' "

Since the above case was decided, additional latitude was given to the City Council to the extent that we have indicated above. They may now appropriate from miscellaneous receipts during the first half of the year. Otherwise,

the law remains the same. Hence, it is not possible to draw on such special funds as are proposed in the way that we understand the committee contemplates.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Authority of Art Commission Over Sign Boards.

March 19, 1926.

HON. EVERETT L. MILLARD, President, Art Commission of the
City of Chicago:

Dear Sir:

In your communication of March 10th, requesting an amplification of Opinion No. 1366 heretofore rendered, you ask whether "authority given in Chapter 24 of Illinois Revised Statutes, Paragraph 295, to the City Council, when exercised, is superior to the power given the Art Commission, or in other words what happens when both bodies regulate sign boards, one issuing a permit and the other disapproving the erection, should such event occur?"

From a careful consideration of the enumerated powers of the Art Commission as set forth in Paragraph 514, Chapter 24, Illinois Revised Statutes, I am of the opinion that the commission is limited to the approval or disapproval of the structures enumerated therein. No power is granted to the commission to issue permits for encroachments extending over the building lines; their powers as enumerated being limited to approval or disapproval thereof, and in case of

disapproval of the structures enumerated in the first paragraph, such structures can not be lawfully erected either with or without the concurrence of the City Council.

The powers of the commission appear to be the same with reference to the structures enumerated in the second paragraph of Paragraph 514, "*except that in case of any such structure (not including works of art) which shall hereafter be contracted for, erected, or altered at a total expense not exceeding two hundred thousand dollars, the approval of said commission shall not be required if the common council shall so direct.*"

Our Supreme Court has repeatedly held that the authority of municipalities over streets and the uses to which they may legitimately be put, depends, within constitutional limitations, entirely upon the charter powers of the municipalities granted by the legislature (*People ex rel. Mather v. Field & Co. et al.*, 266 Ill. 609, 617, and cases therein cited).

The City of Chicago is a municipal corporation existing and operating under the provisions of an act entitled "An Act to provide for the incorporation of cities and villages," approved April 10, 1872, in force July 1, 1872, and amendments thereto (Chapter 24, Revised Statutes of Ill.).

In and by Article V of the foregoing act the powers of the City Council are specifically set forth (Par. 65, Secs. 1 to 100 inclusive). Among such enumerated powers are the following:

"Seventh. To lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.

"Eighth. To plant trees upon the same.

"Ninth. To regulate the use of the same.

"Tenth. To prevent and remove encroachments or obstructions upon the same.

* * * * *

"Ninety-ninth. To regulate the space over the streets, alleys and public places of the city, and upon payment of proper compensation, to be fixed by ordi-

nance, may permit the use of such space more than twelve feet above the level of such streets, alleys or public places.”

By reason of the foregoing I am of the opinion that in the matter of the erection and maintenance of signs or other similar structures which come within the exception stated in the second paragraph of Paragraph 514 of the statute, the Art Commission is wholly without jurisdiction and that such signs and structures may be erected and maintained pursuant to an order of the City Council without any concurrence or approval by the Art Commission.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Action Over for Reimbursement in Case of Injury to Policemen and Firemen.

March 19, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You submitted to us the report of a subcommittee on finance dealing with the question of what should be done in the cases of policemen or firemen injured in the course of their duties where such injury is the result of fault or negligence of other parties who are liable for such negligence. You suggest that suit should be started in the name of the injured person sufficient to cover the hospital and medical ex-

penses, and also to cover the amount of salary and other compensation paid to such policeman or fireman during the period of his incapacity, or such award as may be made to dependents.

The question you submit is a very difficult one in the case of policemen and firemen. When other City employes are injured recovery can be had under Section 29 of the Workmen's Compensation Act. By the provisions of that law the City would be entitled to recovery against the person who is actually liable for the injury.

That is not the case, however, with policemen and firemen who do not come under the terms of the Workmen's Compensation Act. Such policeman or fireman has a personal action for injuries sustained against the party who is liable therefor, and, though the City may have been to expense in caring for him during the time that he was incapacitated, and may have paid him salary or paid his dependents compensation provided by law, we know of no law which authorizes the City to bring suit in his name. The City is not subrogated to the rights of such employe.

There can be provision in the ordinances under which a policeman or fireman, before being paid any compensation or salary after he has sustained an injury, may be required to make such assignment or agreement that the City might be protected. That is as far as the City Council can go, however, under the peculiar conditions that exist in the case of that kind of employes.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Payments to Real Estate Valuers, Etc., Under
Special Authority from the Council.**

March 20, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

We have a letter signed by the auditor which points out that under date of February 10, 1926 (Council Journal, p. 2555), the City Council passed an order authorizing the Board of Local Improvements, in accordance with its recommendation of January 26, 1926, to employ certain valuers and engineers and to charge the same against certain street improvement bond fund accounts. You ask to be advised whether you can legally honor vouchers drawn in accordance with said order.

The particular accounts to which these items are to be charged, are mentioned in the appropriation bill (Council Journal, p. 2279) as being accounts from which no money is to be paid "until the Board of Local Improvements submits to the City Council a statement as to the personnel employed and the amount paid per diem, and said list is approved by the City Council."

These various appropriations set up specific sums which may be drawn on when such authority is given. The order of February 10 apparently follows out the intention of the City Council as expressed in the appropriation ordinance. That is to say, it authorizes the Board of Local Improvements to employ certain persons named therein at certain compensation fixed therein, and it states that the order is passed in accordance with the recommendation of the Board of Local Improvements of January 29, 1926. You have a right to assume that the recommendation of the board of January 29, 1926, mentioned in the order, was of such character as is

required by the appropriation bill, since the appropriation bill does not say in just what form the statement of the Board of Local Improvements should be presented. It is manifest from the order itself that a recommendation in some form stating the personnel to be employed and the amount to be paid per diem was submitted and the City Council has ratified same. The only possible point that could be made might be that the appropriation bill says the statement should be submitted to the City Council, whereas such statement may have been submitted to the Committee on Finance. But even this is done away with by referring to the report of the Committee on Finance which appears in the Council Journal of February 3, 1926, at page 2452, and which says that a communication from the Board of Local Improvements concerning this matter was referred to it. It must have been referred to this committee by the council itself.

Consequently it is entirely proper to honor vouchers drawn in due form against these appropriations.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Removal of Building Without Obtaining Permit.

March 22, 1926.

COL. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We have your letter of even date requesting an opinion from this office *in re* an application for a permit to remove a

two-story residence building from premises known as 8210 South Western avenue to 2359 West 83d street.

In view of the fact that applicant for the said permit had, without right and in violation of Section 3319, Article XVIII, Chapter LXIII, of The Chicago Municipal Code of 1922, proceeded with the removal of this building before obtaining a permit from your department, we are of the opinion that no permit should be issued in this case, and of the further opinion that your department should proceed promptly to force the removal of this obstruction from the street.

Very truly yours,

EDMOND L. MULCAHY,
Second Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Riparian Rights Along Lake North of Grand Avenue.

March 23, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your communication addressed to the Corporation Counsel wherein you request that you be advised "of the nature and present status of the agreement between the Commissioners of Lincoln Park and the former riparian owners north of Grand avenue," has been referred to the undersigned for consideration and reply.

Your inquiry involves primarily a question of fact and has necessitated an extended search of the records in the Recorder's office of Cook County, also the records of the Commissioners of Lincoln Park, for evidence as to the con-

dition of the title to all the premises involved extending from Oak street on the north to Grand avenue (formerly Indiana street) on the south.

Under an act of the legislature of the State of Illinois, entitled, "An Act to enable park commissioners having control of any boulevard or driveway bordering upon any public waters in this State, to extend the same" (Laws 1889, p. 212; Ill. Rev. Statutes [Cahill] 1925, Chapter 105, Paragraph 253, *et seq.*, p. 1746; Callaghan's Illinois Statutes Annotated, Chap. 105, Paragraph 253, *et seq.*), it is provided: "That every board of park commissioners * * * that now has, or may hereafter have, control over any boulevard * * * connected with any public park, and bordering upon any public waters in this State, shall have power * * * to extend such boulevard * * * of the width of not more than two hundred feet over and upon the bed of such public waters. *Provided*, that no such boulevard shall be extended in such manner as to interfere with the navigation of such public waters for the purpose of commerce."

Section 2 of said act provides for frontage consents to be signed by the owners of at least two-thirds of the frontage involved, and further provides that, "The riparian or other rights of the owners of lands on the shore adjoining the waters in which it is proposed to construct such extension, the said board of park commissioners may acquire, by contract with or deeds from any such owner; and in case of inability to agree with any such owner, proceedings may be had to condemn such rights according to the provisions of article nine of an Act entitled 'An Act to provide for the incorporation of cities and villages, approved April 10, 1872, and the amendments thereof.'"

Section 3 of said act provides that, "Upon complying with Section Two of this act, said board shall have power to contract in writing with any person or persons for the construction of such extension of such boulevard or driveway, according to such plan, and under the supervision of said board, and, in all cases where any boulevard * * * is ex-

tended under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard * * * shall be appropriated by the board * * * to the purpose of defraying the cost of such extension and to that end such board * * * are authorized to sell and convey such submerged lands in fee-simple by deeds duly executed on its behalf by its president and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby.”

Section 4 of said act provides that upon the completion of any such extension of such boulevard or driveway, the title thereto, and the bed thereof, shall be vested in such board for the purpose of a boulevard or driveway, and shall become a part of the park under the control of such board, and shall be maintained and controlled by such board in the manner provided by law for the government and maintenance of other boulevards and driveways under its control.

Some time prior to June, 1896, an information was filed in the Circuit Court of Cook County by the Attorney General of Illinois against the Commissioners of Lincoln Park and the owners of land adjacent to the shore of Lake Michigan, between Ohio street and Oak street, in the City of Chicago, for the purpose of canceling certain contracts entered into between said park commissioners and said property owners for the extension of the Lake Shore drive from Oak street to Ohio street, entered into under the foregoing act of the legislature passed in the year 1889. (*People ex rel. Moloney, Attorney General, v. Kirk et al., Commissioners of Lincoln Park*, 162 Ill 138.)

In the foregoing case it was argued, *inter alia*, that said act was unconstitutional, and the court, in an opinion by Mr. Justice Craig, reviewed the provisions of the act in their entirety and held the act to be a valid enactment.

Our next inquiry is whether or not the Commissioners of Lincoln Park have constructed the boulevard or drive-

way in question without complying with the provisions of the foregoing act of the legislature, *i. e.*, have contracts or deeds been obtained from the adjacent owners covering their riparian rights and has compensation been made to such owners pursuant to such contracts or deeds, or awarded in condemnation proceedings, if any, brought to acquire title to the necessary submerged lands and the riparian rights involved?

These are questions to be answered in the first instance by anyone having or claiming to have any right, title or interest in and to any of the submerged lands or abutting rights therein. An owner cannot be deprived of such rights or any part thereof without just compensation being made therefor. (*Miller v. Commissioners of Lincoln Park*, 278 Ill. 400.)

The premises involved in our present inquiry all lie within the territory bounded on the north by Chicago avenue, on the south by Grand avenue and on the east by Lake Michigan, and legally described as County Clerk's Division of the unsubdivided accretions lying east of and adjoining the unsubdivided parts of Blocks 43, 44 and 54, including Lot 19 in east part of Block 54 and Lot A in north part of Block 44 and accretions to Superior and Huron streets and the alleys in Blocks 43 and 44, all in Kinzie's Addition to Chicago, being a subdivision of the north fraction of 10-39-14; also Circuit Court partition of the Ogden estate, subdivision of part of Blocks 20, 31 and 32 in Kinzie's Addition to Chicago.

It appears from the records that in the year 1891 certain agreements were entered into between the commissioners and the owners of the above premises, for the construction of said boulevard or driveway in accordance with the provisions of the above mentioned act of the legislature passed in 1889, and that part of Block 54 which borders upon the extension of the Lake Shore drive also passed to the commissioners by deed from the owners in 1891, including all riparian rights, and on condition that such riparian

rights shall never be used for other than park purposes, and that no building shall ever be erected east of said driveway.

All of the agreements hereinbefore referred to are substantially alike, and all contain the following:

“That no mooring of vessels to the sea wall for business purposes shall ever be allowed, nor shall any docks or piers be built east of said boulevard or driveway, and that if any lands are formed by accretion or otherwise, east of said boulevard or driveway, they shall never be used for the erection of buildings therein, nor for any purposes but those of a public park.”

By reason of the matters and things hereinabove set forth I am of the opinion that the title to premises occupied by the Lake Shore driveway or boulevard extending along the shore of Lake Michigan from Grand avenue on the south to Chicago avenue on the north, including all accretions, natural or artificial, together with all riparian rights adherent thereto, is in the Commissioners of Lincoln Park, and that the City of Chicago cannot lawfully build a pier extending east from the easterly boundary of said driveway or boulevard, or from the lands lying east thereof without first acquiring such right by appropriate court proceedings wherein the just compensation to the owner or owners of and all parties interested in said submerged lands and riparian rights sought to be taken, may be determined and awarded. I know of no valid reason why the City may not acquire such rights, notwithstanding the covenants contained in the deed and agreements above referred to, as prior to such agreements the City had the lawful right to acquire the property and riparian rights in question by condemnation proceedings, and I do not understand that such right on the part of the City can in any way be infringed by the abutting owners entering into agreements with the Commissioners of Lincoln Park affecting riparian rights along the shore of the lake. As to the commissioners, however, a different situation is presented, and I am of the opinion that they are bound to maintain the property acquired by

them under the deed and agreements above referred to in accordance with the conditions imposed therein, subject, however, to the right of the City to acquire such property by appropriate proceedings.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

I concur in the foregoing opinion.

W. ARNOLD AMBERG,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Overpayments Made to Widow of Policeman as Widow of Another Policeman.

March 23, 1926.

RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

Replying to your letter of March 15th, requesting an opinion as to the power of your Honorable Body to withhold from future pension payments to Mrs. Ella Callahan, widow of Denny D. Callahan, a policeman, moneys overpaid her during the time she was receiving a pension as the widow of Michael Mullane, also a policeman, the following is submitted.

Section 58 of the Policemen's Annuity and Benefit Fund Act, as amended July 2, 1925, contains the following provision:

“And provided, further, that the retirement board may retain out of any future annuity, pension or disability benefit payments such amount, or amounts, as it may in its discretion set for the purpose of repayment into the annuity and benefit fund herein provided for of any moneys paid to any annuitant, pensioner, or disability beneficiary through misrepresentation, fraud or error.”

The Policemen's Annuity and Benefit Fund is a trust fund, and whether Mrs. Callahan was or is paid moneys out of this fund, either as the widow of Michael Mullane or as the widow of Denny D. Callahan, she was and is being paid out of the same specific trust fund.

The right of your Honorable Body to retain out of any future annuity, pension or disability benefit payments any amounts for the purpose of repayment into the annuity and benefit fund of any moneys paid to any beneficiary through misrepresentation, fraud or error is not limited by the source of the right of such beneficiary in and to the annuity, pension or other benefit paid or to be paid; the act contains no limitations, conditions, restrictions or qualifications affecting the recovery of improper payments by the method prescribed in the act.

I am of the opinion that any beneficiary who receives money from the annuity and benefit fund improperly can be required to pay that money back through the process of withholding any future payments to which such beneficiary might or should become entitled until such time as the total of the payments so withheld equals the amount of the improper payments.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Fire Escapes on Schools.

March 23, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge receipt of your letter of March 15th transmitting a communication from Messrs. Child & Smith, architects for the Wieboldt Hall School of Commerce to be located at 337-343 East Chicago avenue.

You state that you have refused to approve the plans for this building on account of the matter of fire escapes; that you do not insist upon fire escapes being placed on the outside of the building, but that you do insist on fire escapes being provided so that this building, which is to be over four stories high, will have superior exit facilities to a building less than four stories high; that the plans submitted provide only for such stairways as are required in a building less than four stories high; that Messrs. Child & Smith think that the ordinances allow them to use stairways also as fire escapes without providing an additional number of them even where the building is more than four stories high.

As the structure is to be used for school purposes it becomes by virtue of Section 695 of The Chicago Municipal Code of 1922 a Class VIII building.

We are unable to find any provision in the ordinances requiring a Class VIII building over four stories high to have superior exit facilities to a Class VIII building four stories high, the exit facilities in the way of stairs and fire escapes apparently depending more upon the seating capacity of such a building rather than the number of stories it contains.

The provisions of the code concerning fire escapes for Class VIII buildings are set forth in Section 712 of The Chicago Municipal Code of 1922, and read as follows:

“712. FIRE ESCAPES.) (a) Every building used for the purposes of Class VIII of *four* or more stories in height, shall be provided and equipped with stairway fire escapes or sliding fire escapes as herein provided:

(b) All such buildings having a seating capacity of less than two hundred on any one floor above the *third* floor shall have at least one such fire escape.

(c) All such buildings having a seating capacity of over two hundred but less than four hundred in any one story above the *third* floor shall have at least two such fire escapes.

(d) All such buildings having a seating capacity of more than four hundred but less than six hundred on any floor above the *third* floor shall have at least three such fire escapes.

(e) At least one additional stairway or sliding fire escape shall be provided for every increase of two hundred seating capacity in any one story above the *third* floor.

(f) Stairway fire escapes shall be built in accordance with the requirements of sections 881, 882 and 885, and shall be subject to the approval of the commissioner of buildings.

(g) Sliding fire escapes shall be securely anchored or fastened to the building and shall have a radius or width of not less than thirty-six inches, and the inner side of the same shall be entirely smooth and made of metal. There shall be an entrance to each sliding fire escape from each floor above the first story. They shall be of a pitch of not less than thirty degrees nor more than forty-five degrees for straight runs. They shall be so constructed that they will discharge people not more than twenty-four inches from the adjacent ground or floor. They shall be of such pattern and design as will best secure the safety of the public, and their construction, location and maintenance shall be subject to the approval of the commissioner of buildings. Spiral sliding fire escapes shall have two complete turns for each story height of more than thirteen or less than sixteen feet.

(h) All the provisions of this chapter relating to outside sliding or stair fire escapes shall apply to buildings of class VIII, unless such buildings are fireproof, in which case interior fire escapes from ground to roof may be substituted for exterior fire escapes; provided,

such interior fire escapes shall comply with each and all of the following conditions:

(i) Interior fire escapes in fireproof buildings shall be enclosed in brick or concrete walls on all sides from top to bottom, and shall be enclosed at the top with a fireproof penthouse. The treads and risers of such interior fire escapes shall be the same as those used for stairs elsewhere in the building, and the width of such fire escapes shall not be less than forty inches in their narrowest part between handrails.

(j) The landings of such fire escapes shall, exclusive of and in addition to the space covered or occupied by swinging doors, be at least equal to the stairs in width. All doors leading to such fire escapes shall be incombustible doors and the glass portion thereof shall be glazed with polished wire glass not less than one-quarter of an inch thick, which shall be large enough to enable persons to see other persons on the opposite side of the doors. The combined width of said doors on each landing shall exceed the stair in width twenty-five per cent, but no single door shall be more than three feet wide. They shall be hinged and equipped with automatic opening and closing devices and shall open outward. Windows lighting such fire escapes shall have metal frames and sash and wired glass.

(k) The number and capacity of such interior fire escapes shall in no case be less than is elsewhere in this chapter required for outside fire escapes, and the locations of the same shall be as far apart as practicable and so placed as to best secure the safety of the persons using the same in case of fire, accident or panic.

(l) Such interior fire escapes which comply with all the conditions above enumerated may be used daily as ordinary stairs."

Under paragraph (d) because of its seating capacity, it is necessary that the proposed building have at least three fire escapes. Being fireproof, under paragraph (h) interior fire escapes may be substituted for exterior fire escapes, provided such interior fire escapes comply in their construction with the provisions of the ordinance, and the letter of Child & Smith which you enclose states that they do. Paragraph (1) permits such additional fire escapes to be used daily as ordinary stairs.

Section 701 of The Revised Municipal Code of 1922 contains the general requirements for width of stairs in Class VIII buildings and provides for 15 inches width of stairs for every 100 seating capacity of the structure as measured by the aggregate seating capacity. It also provides that the number of people allowed in the building shall be governed by the width of the stairs available as exits therefrom. For the proposed building, the owners state that they have provided 13'9" width of stairs to take care of the persons who will occupy the class rooms above the second floor, and from the second floor down they are providing 6' 4 1/2" additional width of stairs.

Section 880 of The Revised Municipal Code of 1922 in paragraph (a) provides that the width of stairway fire escapes may be deducted from the width of stairs required.

As the proposed building will be used for school purposes it is, of course, of controlling importance that it be made to comply fully with the ordinances relating to stairways and fire escapes. The difficulty of requiring additional fire escapes, however, is that we can find no ordinance, nor has our attention been called to any, which would require this building to be provided with fire escapes or stairways in addition to what they show upon their plans as set forth in their communication.

As we read the ordinances the structure being fireproof need have no exterior fire escapes but must have at least three interior fire escapes. These three interior fire escapes are provided for in the building and they may be used daily for ordinary stairs, and that it is intended to do. There also must be provided 15" width of stairs for every hundred seating capacity. They are providing 13'9" of stairs above the second floor, but they are deducting from the width of stairs required the width of stairway fire escapes which will be installed, and this is expressly permitted by the ordinance.

After careful consideration we feel that the owners of this building are within their legal rights in the matter of

fire escapes and stairs as set forth in their letter which you enclose.

The state statute relative to fire escapes would require outside fire escapes on the proposed building, but it does not apply to buildings erected in the City of Chicago. The letter from Messrs. Child & Smith which you enclosed is herewith returned.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Erection of Factory Building in Commercially Zoned
District in Block Where Majority of Buildings
Are Exclusively Residential.**

March 23, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of March 19th transmitting a communication from the Hill Products Corporation, and requesting the views of this department.

Plans have been submitted, we understand, and application has been made to you for a factory building to be erected on Kenton and Parker and Schubert avenues. The building will abut on the three streets. The premises upon which the building is to be erected are in a commercial district under the terms of the Zoning Ordinance, and the use permitted is that of a commercial district. Immediately north of the proposed building is a manufacturing district,

while east of it is the right of way of the Chicago & Northwestern Railroad.

But, you state, a permit has been refused by your department because one-half of the buildings in the block on Schubert avenue, which is one of the streets upon which the building will abut, are used exclusively for residence purposes, and no frontage consents of the owners of property thereon have been filed as provided by Section 921 of The Chicago Municipal Code of 1922, reading as follows:

“921. FRONTAGE CONSENTS—WHERE REQUIRED—USES OF PROPERTY FOR WHICH REQUIRED—CONSENT IN WRITING.) It shall be unlawful for any person, firm or corporation to locate, build, construct or maintain on any lot fronting on any street or alley in the city in any block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, or within fifty feet of any such street, any building, structure or place used for a gas reservoir, manufacture of gas, stock yards, slaughter house, packing house, smoke house or place where fish or meats are smoked or cured, soap factory, glue factory, size or gelatine manufactory, renderies, fertilizer manufactory, tannery, storing or scraping of raw hides or skins, lime kiln, cement or plaster of paris manufactory, oil cloth or linoleum manufactory, rubber manufacture from the crude material, saw or planing mill, wood working establishment, starch factory, glucose or dextrine manufactory, textile factory, laundry run by machinery, factory combined with a foundry, iron or steel works, brass or copper works, sheet metal works, blacksmithing or horseshoeing shop, boiler making, foundry, smelter, metal refinery, machine shop, stone or monument works run by machinery, asphalt manufacture or refining, paint or varnish factory, oil or turpentine factory, printing ink factory, tar distillation or manufacture, tar roofing, tar paper or tarred fabric manufactory, ammonia, chlorine or bleaching powder factory, celluloid manufactory, place for the distillation of wood or bones, lamp black factory, sulphurous acid, sulphuric acid, nitric or hydrochloric acid manufacture, factories or other manufacturing establishments using machinery or emitting offensive or noxious fumes, odors or noises, storage warehouses, storing or baling of junk or scrap paper or rags, shoddy man-

ufacture or wool scouring, second-hand store or yard, incineration or reduction of garbage, offal, dead animals or refuse, stable for more than five horses, medical dispensary, livery stable, sale stable, boarding stable, without the written consent of a majority of the property owners according to frontage on both sides of such street or alley. Such written consent shall be obtained and filed with the commissioner of buildings before a permit is issued for the construction or alteration of any building, structure or place for any of the above purposes; provided, that, in determining whether one-half of the buildings on both sides of the street are used exclusively for residence purposes, any building fronting upon another street and located upon a corner lot shall not be considered."

It is stated in the letter of the Hill Products Corporation, which you transmit, that the proposed building is to be used for the purpose of threading nuts and refurbishing and finishing in brass and iron; that it will not emit fumes, disagreeable odors, smoke, soot, objectionable noises or vibrations; that the building they propose to erect will be sightly; that they expect to put the grounds surrounding the building in presentable shape by grading and seeding, to which they hope to add trees and shrubbery; that they have always taken pride in the appearance of their establishment and that they feel confident that the proposed building will be a credit to any neighborhood.

The Hill Products Corporation do not contend in their communication that the proposed building will not be a "factory or other manufacturing establishment using machinery," which is one of the uses prohibited by Section 921 in certain locations without frontage consents, but they do specifically set forth that, with that exception, the building will not be used for any of the other uses forbidden by Section 921.

The owner of the property has apprised us of his intention to institute mandamus proceedings to compel the issuance of the permit in case it is refused, because he states that as a matter of law frontage consents are not required.

It is important, therefore, to consider at some length the law in relation to the matter to determine whether the City may lawfully require frontage consents before the issuance of a permit for the proposed building.

Section 921, set out above, clearly prohibits the erection of a building to be used for a factory or other manufacturing establishment using machinery, such as the one under discussion, in a block in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without the written consent of a majority of the property owners. If that provision is valid frontage consents would have to be obtained in a proper case. On the other hand, if that requirement is so clearly invalid that there can be no reasonable difference of opinion upon the subject, the City would hardly be justified in expending its own time, money and effort or the time, money and effort of a property owner in a fruitless effort to sustain it in the courts.

If the proposed building were to be used for a "machine shop" or for a "foundry" an altogether different question would arise, because there is no doubt of the right of the City to require frontage consents for such uses.

The communication, however, which you transmit to us signed by the president of the Hill Products Company, shows a familiarity with the provisions of the ordinance and he expressly states therein that the proposed building will not be used for a machine shop or a factory combined with a foundry.

Probably no one can tell as well as the parties who made the application whether or not it is to be used for a machine shop or a factory combined with a foundry, and you are bound to accept the statement of the owner of the premises to the effect that it will not be used that way. (See opinion of the Corporation Counsel to Commissioner of Buildings, dated November 1, 1917, in printed book of opinions.)

Assuming, then, that the proposed building, as stated by the owner thereof, will not be used for a foundry or machine shop but would simply be an ordinary factory, would the City under the law be justified in requiring frontage consents before issuing a permit for its erection?

Cities are creatures of the legislature and derive their existence and powers therefrom. They have no inherent powers and derive all of their powers from the Legislature. Statutes granting powers to municipal corporations are strictly construed, and any fair and reasonable doubt as to the existence of the powers must be resolved against the municipality. *Barnard and Miller v. City*, 316 Ill. 519.

That part of Section 921 of The Revised Municipal Code of 1922 prohibiting the location of "factories or other manufacturing establishments using machinery" in blocks in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without obtaining frontage consents, was based upon Clause 82 of Section 1 of Article 5 of the Cities and Villages Act, as amended in 1919, reading as follows:

"The City Council in cities * * * shall have the following powers:

"Eighty-two: To control the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables, wagon repair shops, blacksmith shops, foundries, machine shops, public garages, private garages and stables designed for the use of five or more vehicles, hangars, laundries, bathing beaches, brick yards, planing mills, flour mills, box factories, lead factories, steel factories, iron factories, ice plants, either for the manufacturing or storing of ice, *factories or other manufacturing establishments using machinery* or emitting offensive or noxious fumes, odors, or noises, and storage warehouses, within the limits of the city or village; provided, that this clause shall not be construed to require the removal of any of the above enumerated buildings from any location which they may lawfully occupy at the time of the passage of any ordinance hereunder." (Laws of 1919, p. 285.)

But said Clause 82 as amended in 1919 has been declared invalid by the Supreme Court because of the proviso

it contained, and that clause can be invoked for no purpose. *People v. Kaul*, 302 Ill. 317; *Moy v. City of Chicago*, 309 Ill. 242; *Arms v. City of Chicago*, 314 Ill. 316; *Barnard & Miller v. City of Chicago*, 316 Ill. 519, and *Rippinger v. Niederst*, 317 Ill. 264. Obviously then the City has no authority to control the location or regulate the use of ordinary factories under the doctrine announced in those cases.

In the *Kaul* case, cited above, the question presented to the Supreme Court was the validity of an ordinance of the Village of Forest Park, seeking to control the location of factories, which read as follows:

“It shall be unlawful for any person, firm or corporation to keep, conduct, operate, locate, build or construct any brewery, distillery, livery, boarding or sale stable, wagon repair shop, blacksmith shop, foundry, machine shop, public garage, private garage or stable designed for the use of five or more vehicles, hangar, laundry, brick yard, planing mill, flour mill, box factory, lead factory, steel factory, iron factory, ice plant, either for the manufacture or storing of ice, factory or other manufacturing establishment using machinery, emitting offensive or noxious fumes, odors or noises, or storage warehouse, within the limits of the Village of Forest Park within 1000 feet of any building used as and for a hospital, church or public or parochial school or the grounds thereof.”

Kaul desired to construct a factory but was refused a permit because the proposed factory was to be erected within 1000 feet of a church and within 1000 feet of public schools, in contravention of the ordinance. The Supreme Court held that the Village of Forest Park had no authority to direct the location of the factory, and that the ordinance was void, as it was based on Clause 82 as enacted in 1919, quoted above, which the court held was an invalid statute.

In the comparatively recent *Barnard & Miller* case, cited above, there was before the Supreme Court the question of the validity of the ordinance of the City of Chicago seeking, among other things, to regulate the operation of factories. It was contended by the City that said ordi-

nance could be based on said Clause 82, but the court said it had theretofore held Clause 82 invalid. It was contended by the City that its power might also be based on Clause 66, the so-called police power clause; Clause 75, the nuisance clause; and Clause 78, the health clause. These clauses respectively authorize the City to regulate the police of the City and pass and enforce all necessary police ordinances; to declare what shall be a nuisance and to abate the same; to do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease. But the Supreme Court held that ordinance was void, and in its opinion stated that the City by that ordinance had arbitrarily assumed powers and duties without the authority of any law or any clause found in the one hundred clauses of Section 1 of Article 5 of the Cities and Villages Act, which is the source of the legislative power of the City Council.

It will thus readily appear that there is no authority in the City of Chicago at the present time, under the hundred clauses of Article 1 of Section 5 of the Cities and Villages Act, to control the location or regulate the use of ordinary factory buildings. It necessarily follows that that part of Section 921 which is based on Clause 82 as amended in 1919 and which seeks to direct the location of ordinary factories or other manufacturing establishments using machinery by requiring frontage consents is clearly invalid. The pronouncements of the Supreme Court, in the five different recent cases, are so conclusive upon the question that it would be useless for the City to seek to uphold the ordinance in that particular in the courts.

While the part of Section 921 prohibiting in certain blocks unless frontage consents are filed the erection of buildings to be used for ordinary factories or other manufacturing establishments using machinery, is invalid, yet if the proposed building were to be used as a machine shop or a foundry, it would be, as we have said above, a different matter.

The City has ample authority to direct the location and regulate the use of machine shops or foundries. For though Clause 82 as enacted in 1919, and which sought to give the City power to control the location and regulate the use of factories or other manufacturing establishments using machinery, was declared invalid by the Supreme Court in the different cases above cited, yet the Supreme Court, in the later case of *Rippinger v. Niederst*, 317 Ill. 264, expressly held that the ineffectual attempt of the Legislature to amend Clause 82 in 1919, by passing an invalid act, left Clause 82 in force as it was originally enacted in 1911.

Clause 82 as originally enacted in 1911 authorized the City to direct the location and regulate the use of but a portion of the uses covered by the invalid 1919 amendment, and said Clause 82 as enacted in 1911 reads as follows:

“To direct the location and regulate the use and construction of breweries, distilleries, livery, boarding or sale stables, blacksmith shops, *foundries, machine shops*, garages, laundries and bathing beaches within the limits of the city or village.” (Laws of 1911, p. 179.)

Under the 1911 enactment of Clause 82 the City unquestionably has power to direct the location of foundries and machine shops, and under the authority of that act Section 921 of The Chicago Municipal Code of 1922 does prohibit the erection of a machine shop or a factory combined with a foundry in blocks in which one-half of the buildings are exclusively residential unless certain frontage consents are obtained.

Although the question of what is a machine shop or what is a foundry has not yet arisen by reason of the fact that you have no right to assume that the premises will be used for such purpose, nevertheless we will briefly call your attention to what we think is the legal construction of those terms.

The Century Dictionary defines a machine shop as follows:

“A workshop in which machines or parts of machines are made and repaired.”

In *Goddard v Monitor M. F. Ins. Co.*, 108 Mass. 56, it was held that a building used for the construction of organs and melodeons cannot be regarded as a machine shop, and the court indicates in the opinion that a machine shop must be construed as one in which machinery is manufactured or repaired.

In an opinion of this department, to your predecessor, written by Assistant Corporation Counsel Hornstein as to whether a building for the manufacture of certain small parts and appliances used in connection with automobiles was a machine shop, the following language was used:

“We are of the opinion that a manufacturing plant cannot be regarded as a machine shop unless machines are constructed or repaired. That seems to be the common acceptance of the term.”

Again, this department was requested for an opinion as to whether frontage consents could be required for a planing mill on the theory it was a machine shop, and in an opinion also by Assistant Corporation Counsel Hornstein it was stated:

“A planing mill is not a machine shop in the general acceptance of the term. It could only be construed as a machine shop on the theory that all places which run machines are machine shops. This is not a proper interpretation to be placed on the words. (*Hoskin v. Woodward*, 45 Pa. 42; *Goddard v. Monitor M. F. Ins. Co.*, 108 Mass. 56.)”

At another time this department was asked whether frontage consents could be required for a box factory in a residence block, and in the opinion in that case the following construction was given:

“This ordinance as it now stands prohibits the construction of a machine shop in residential districts. It also prohibits the construction of a factory combined with a foundry in such districts, but does not prohibit the construction of any factory that is not specifically mentioned if it is not combined with a foundry * * *

“It will, therefore, be seen that in case application is made for a permit for the erection of a factory build-

ing, in the district referred to, which has no foundry connected therewith and does not come within those specifically mentioned in the ordinance as requiring frontage consents, a permit will have to be granted. This includes a permit for a box factory."

As a result of the decision of our Supreme Court, in the *Barnard & Miller* case, cited above, holding invalid our ordinance for the regulation of factories and workshops, on the ground that the City had no power to enact it, this department prepared for the City Council new ordinances covering the regulation of foundries and machine shops, which the City clearly has the power to regulate and direct the location of under Clause 82 as enacted in 1911.

In the ordinance to regulate machine shops, a machine shop is defined as follows:

"A machine shop is hereby defined to be a work shop in which machines are made or repaired."

In the ordinance to regulate foundries, which was enacted by the City Council December 30, 1925, a foundry is defined as follows:

"A foundry is hereby defined to be any place or establishment where iron, copper, brass, zinc, lead, aluminum, bronze or any other metal or metals are molded or cast for building, agricultural, mechanical or other industrial or commercial purposes."

Some claim is also made by the owner of this property that the frontage consent ordinances of the City are repealed by the provisions of the Zoning Ordinance which restrict commercial uses to commercial and manufacturing districts. There is nothing, however, in that contention, as the Zoning Ordinance expressly provides that it shall not be construed as repealing any such valid ordinances.

We are clearly of the opinion that the City has no valid ordinance at the present time requiring frontage consents for the proposed factory and that it is neither the duty nor the province of the administrative departments to seek to enforce a clearly invalid requirement of an ordinance.

It is not the purpose or practice of this department to hold provisions of ordinances to be invalid as applied to certain situations by construction or interpretation, and we are not doing so in this case. But in view of the decisions of the Supreme Court in no less than five comparatively recent cases, above enumerated, it would be idle or useless for us to advise you otherwise than we do in reference to the particular application for permit which we are now discussing.

We are not passing at all upon the question whether the City would have the right to require frontage consents for uses such as the proposed factory under the zoning enabling statute. That would be an altogether different matter. But certainly the requirement of the ordinance that frontage consents must be obtained in certain blocks for certain uses was not based upon the authority of the zoning enabling statute, for that statute expressly provides for the manner in which ordinances passed under it shall be enacted, and Section 921 was not enacted in accordance with the provisions of that statute. If the City has such power under the Zoning Enabling Act, it has not up to this time exercised it.

Neither do we wish to be understood as passing upon the matter of the requirement of frontage consents for any of the uses specified in Section 921 of the revised municipal code except uses similar to the proposed factory. The City has authority to direct the location of a great many of the uses enumerated in Section 921 as requiring frontage consents. If not under Clause 82 as enacted in 1911, then under the various other 99 sub-sections of Section 1 of Article V of the Cities and Villages Act.

In conclusion, we would respectfully advise you that, in our opinion, no successful defense could be made by the City to a petition for mandamus to compel the issuance of this permit for the erection of the proposed building, and we therefore recommend that you issue it without requiring frontage consents. If it should develop after the building

is constructed that it will be used for a machine shop, or a foundry, or any other use the location of which is prohibited by valid ordinance, it is within the power of the City to prevent its use for such purpose until proper frontage consents are obtained.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Right of Police Hostler's Widow to be Paid a Pension.

March 24, 1926.

RETIREMENT BOARD, Policemen's Annuity & Benefit Fund.

Gentlemen:

Replying to your letter of March 15, 1926, asking for an opinion as to the right of Ella M. Wagner to be paid a pension, the following is submitted:

From the record submitted to me, it appears that Ella M. Wagner is the widow of a hostler who became separated from the Police Department by death on April 2, 1914, with a service credit on the Police Department of 16 years, 10 months and 25 days; that at the time of his death, Mr. Wagner was a contributor to the Municipal Employees Pension Fund, as hostlers were not classified as policemen at that time; that in 1920, "hostlers were made policemen" and were transferred from the Municipal Employees Fund to the Police Pension Fund and their contributions to the former fund transferred to the latter fund; that the minutes of the Retirement Board of March 14, 1922, show that

the application of Mrs. Wagner for a pension was granted; that on April 15, 1922, a check was issued to the order of Ella M. Wagner in the amount of \$2,500; and that Mrs. Wagner is now carried on the pension roll at \$50 per month.

I.

In 1915, the Legislature passed a Police Pension Fund Act, in Section 7 of which the word "policeman" was declared to include

"Any person who has been appointed and sworn or designated by law as a policeman, prior to the taking effect of this Act, and has served in a regularly constituted police department as a policeman, or police patrol driver and police operator and a member of the police force thereof, and contributed to the Police Pension Fund for such time as he has been in the service of such police department as a policeman, or police patrol driver and police operator. The intention being that all policemen, or police patrol drivers and police operators who have so contributed to the Police Pension Fund (their widows and children entitled thereto) shall be entitled to any of the benefits of any pension law in force and effect when this Act, in cities within its terms, shall supersede an Act entitled, "An Act to provide for the setting apart, formation and disbursement of a Police Pension Fund in cities, villages and incorporated towns."

II.

In 1921, the Legislature amended Section 7 of the Police Pension Fund Act of 1915 to read as follows:

"Whenever the word 'policeman,' as used in this Act, appears, the same shall be interpreted and construed to mean and to include the following:

Any person who has been appointed and sworn or designated by law as a policeman, and has served in a regularly constituted police department as a policeman, or police patrol driver or police operator, police dog catcher or police kennelman or special investigator or police hostler and a member of the police force thereof and contributed to the police pension fund for such time as he has been in the service of such police department

as a policeman, or police patrol driver or police operator or police dog catcher or police kennelman or police hostler; the intention being that all policemen or police patrol drivers or police operators, police dog catchers or police kennelmen, special investigators or police hostlers who have so contributed to the police pension fund (their widows and children entitled thereto) shall be entitled to any of the benefits of any pension law in force and effect when this Act, in cities within its terms, shall supersede an Act entitled, 'An Act to provide for the setting apart, formation and disbursement of a police pension fund in cities, villages and incorporated towns,' approved April 29, 1887, in force July 1, 1887, as subsequently amended."

III.

In construing Section 7 of the act of 1915, our Supreme Court, in the case of *People v. Foreman*, 296 Ill. 487, on page 493, uses the following language:

"The Act of 1915, which superseded the Act 1887 with its amendments, defined the meaning of the word 'policeman' so as to include police operators, and it is insisted that to give that definition to the word as previously used would make the act of 1915 retrospective and confer rights not previously existing. Retroactive legislation changing rights is not favored, and a court will never give to a law such an operation unless compelled to do so by language so clear and explicit as to admit of no other interpretation. No statute will be allowed a retrospective operation, although within the legislative power, unless the will of the legislature is declared in terms so plain and positive as to admit of no doubt that such was the intention. (*Garrett v. Wiggins*, 1 Scam. 335; *Robinson v. Rowan*, 2 *id.* 499; *Brice v. Schuyler*, 4 Gilm. 221; *People v. Deutsche Gemeinde*, 249 Ill. 132.) There is no such declaration of intention in the act of 1915, and it cannot be given a retroactive effect so as to include persons not previously entitled to pensions. If, however, the purpose of the act of 1915 was to define what members of the police force were included in the term 'policeman' as used in the various acts relating to the same subject and giving continuous rights, then the relators were entitled to pen-

sions, because their husbands had been members of the police force and rendered service as police operators. *The construction given to the word 'policeman' was not and did not purport to be the creation of any new right,* but only a settlement of the question what the legislature meant to include in the term 'policeman.' If that is not so, members of the police force who had served as police operators for a long term of years would have no benefit from the police pension fund until subsequent service for the statutory period, no matter how meritorious the service had been. The more reasonable conclusion appears to be that the legislative intention was to give a definition or interpretation of the word 'policeman' as used in the series of acts constituting the legislation on the same subject."

I V.

I do not believe that the fact that Arthur Wagner, deceased husband of Ella M. Wagner, died on April 2, 1914, and prior to the amendment of the Police Pension Act hereinabove referred to, in any way militated against the right of his wife to be paid a pension.

In the case of *People v. Foreman*, above quoted, Mary Meehan was declared entitled to a pension as the widow of a police operator, although he died on October 29, 1914, which was prior to the enactment of the Pension Act of 1915. In the same case (*People v. Foreman*) Elizabeth Farrell, widow of James J. Farrell, a police operator, was also held to be entitled to a pension, although her husband died on October 31, 1913.

In the instant case, Arthur Wagner, a police hostler, died on April 2, 1914, which was subsequent to the death of James J. Farrell and prior to the death of Edward Meehan.

The only question involved here is, whether or not a hostler was a member of the Police Department in the same sense that an operator was held to be such member by our Supreme Court. Under the reasoning of the court in the case cited (*People v. Foreman*), I feel constrained to hold

that a hostler was a member of the Police Department equally with an operator.

V.

The record submitted to me states that Arthur Wagner died while a member of the Police Department, "with a service credit on the Police Department of 16 years, 10 months and 25 days." If Arthur Wagner served on the Police Department for more than 10 years prior to his death in 1914, then the right of his widow to a pension was fixed by Section 6 of the Police Pension Fund Act of 1887, as amended in 1913, which said Section 6 contains the following provision:

"Whenever any policeman shall die after ten years' service and while still in the service of such city, village or town, as a policeman, leaving a widow or child or children under the age of sixteen years, then upon satisfactory proof of such facts made to it, said board shall order and direct that a pension of one-half the salary, not exceeding the sum of nine hundred dollars, shall be paid to such widow, or if there be no widow, then to such child or children until they shall be sixteen years of age, said pension to cease upon marriage, as provided above."

The fact that Arthur Wagner during his lifetime was a contributor to the Municipal Employees Pension Fund and not to the Police Pension Fund was due to the fact that the City placed his salary deductions in the Municipal Fund instead of in the Police Pension Fund, which was a matter over which Wagner had no control and which was within the province of the City of Chicago.

When *hostlers* and *operators* were held to be members of the Police Department, and their contributions were transferred from the Municipal Employees Pension Fund to the Police Pension Fund, there should have been turned over to the Police Pension Fund by the Municipal Employees Pension Fund all contributions or salary deductions therefore at any time paid into the Municipal Employees Pen-

sion Fund, or credited to that fund by the City, including those of the dead as well as those of the living, and if the salary deductions or contributions of Wagner have not been transferred from the Municipal Employees Pension Fund to the Police Pension Fund, then such transfer should now be made together with the accrued interest thereon.

VI.

I am of the opinion that upon the facts as presented to me, and upon the holding of the Supreme Court in the case above cited, Mrs. Ella M. Wagner was and is entitled to a pension as the widow of Arthur Wagner, in accordance with the provisions of the Police Pension Act of 1887, as amended in 1913.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Order of Names of Candidates for Municipal Court Judges on Ballot.

March 25, 1926.

HON. AL. F. GORMAN, City Clerk.

Dear Sir:

In response to your request of March 25, for an opinion as to whether Section 33 of the Primary Election Law of the State compels you to furnish the Election Board with a list of names of Municipal Court candidates as they should appear on the ballot or whether Section 61 of the same act makes it the duty of the Board of Election Commissioners to arrange the names of such candidates on the ballot, we desire to say that it is our opinion that Section 33 of

the Primary Act governs, and makes it your duty to furnish the list of candidates above referred to to the Election Commissioners in the manner in which the names of such candidates should appear on the ballot.

Section 61 of the act has been in force for a number of years and at the time of its passage the Legislature could not have had in contemplation a situation which arises under Section 33 as amended. There was no provision in the law prior to the amendment of Section 33 in 1925 which required you to make a certification of a group of candidates whose names were required to be placed on the ballots in alphabetical rotation. This being the case, it is our opinion that a new duty was created under the amendment of Section 33 in 1925 for the City Clerk to perform, which is not directory but mandatory in character. We, therefore, say that Section 61 does not apply and it is your manifest duty under Section 33 as amended to certify the list of candidates to the Election Commissioners in the order which they must be printed on the ballot.

Very truly yours,

EDMOND L. MULCAHY,
Second Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Refund of Part of Ordinary Disability Benefit Contributions.

March 26, 1926.

RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Replying to your request of March 2, 1926, for an opinion as to the right of a municipal employee to have refunded

to him a pro rata share of his ordinary disability benefit contributions, the following is submitted:

Section 47 of the Municipal Employees Annuity and Benefit Fund Act provides that contributions of the ordinary disability benefit fund shall be made by all municipal employees less than 65 years of age through deductions from the first payment of salary or wages due and payable to such municipal employee in the months of January and July of each year. The act makes no provision for monthly computations nor for refunds of any portion of the deductions so made.

I am of the opinion that a municipal employee is not entitled to have refunded to him any portion of his ordinary disability benefit deductions or contributions for any portion of the period for which such deductions or contributions were made, under the act as it now reads.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Refund of Disability Payments.

March 26, 1926.

RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen:

Replying to your letter of March 4, 1926, for an opinion as to the right of an employee to be repaid deductions made in error for ordinary disability benefits, the following is submitted.

Your letter states that you have several cases where no deductions for ordinary disability benefits have been made because an employee was not on the payroll at the time such deductions had to be made, and the employee thereafter failed to make the contributions himself, and, consequently, lost his rights to ordinary disability benefits, but that the payroll clerk at some subsequent period or periods made the ordinary disability benefit deductions from his salary or wages for such subsequent period; that thereafter such employee has gone to the medical examiner and has been found to be in good physical condition and has been reinstated in the ordinary disability section as provided in Section 47 of the Municipal Employees Annuity and Benefit Fund Act.

Any employee whose right to ordinary disability benefits was forfeited because of his failure to pay the regular contributions was receiving no disability protection, and was entitled to no disability benefits, until reinstated after a medical examination as required in Section 47 of the act, and, consequently, deductions made from his salary after such forfeiture and prior to such reinstatement were deductions made in error.

I am, therefore, of the opinion that such employee is entitled to have the said erroneous deductions repaid to him.

Respectfully submitted,

GEORGE F. MULLIGAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Right of Municipal Employee to Direct Payment of Annuity.

March 26, 1926.

RETIREMENT BOARD, Municipal Employees Annuity and Benefit Fund.

Gentlemen :

Replying to your letter of March 3, 1926, for an opinion as to the right of a municipal employee to direct that in case of his death before availing himself of his annuity rights (or dying a short time after becoming an annuitant) that the refund of the moneys due under Section 39 of the Municipal Employees Annuity and Benefit Fund Act should be paid to his second wife to whom he was married after he had reached the age of 65 years.

Subdivision "E" of Paragraph 5 of Section 39 of the act provides that a refund of the character hereinabove described shall be paid to the children of such municipal employee in equal parts to each, unless such municipal employee shall direct in writing, sworn to before an officer authorized to administer oaths in this State, and filed with the Retirement Board before the death of such municipal employee, that any such amount shall be refunded and paid to any one or more of such children, and if there be no such children such amount shall be refunded and paid to the heirs of such municipal employee, according to the law pertaining to estates of deceased persons.

There is no provision in the act granting any benefit or payment to the widow of a municipal employee who married such employee after he had attained 65 years of age.

I am of the opinion that any refunds payable in a case of the kind hereinabove described will have to be paid in:

accordance with Subdivision "E" of Paragraph 5 of Section 39 of the act.

Respectfully submitted,

GEORGE F. MULLIGAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

**Items of Expense Chargeable to Western Avenue
Improvement Fund Bond.**

March 29, 1926.

HON. MARTIN J. O'BRIEN, City Comptroller.

Dear Sir:

In your letter of the 23d instant you state that the order of the City Council on which you want information is the one passed on February 10, 1926, and appearing at the bottom of the left-hand column and the top of the right-hand column of page 2555 of the Council Journal of that date. We had assumed that you wanted information in regard to the order which just preceded the one you inquired about, but we find that we had mistaken your inquiry, and we will now take up the one that is in doubt.

It appears that on January 26, 1926, the Board of Local Improvements asked for authority to pay certain commissioners' fees, miscellaneous expenses and cost of court reporting out of bond funds for Western avenue, Ashland avenue and South Water street improvements. There had been no appropriations made for the specific items which they were seeking to pay. They suggested certain new accounts drawn against such bond funds.

We note attached to the request of the Board of Local Improvements and the order which was passed by the City Council a letter of advice from the staff of the Finance Committee. This states that the bills that were incurred were proper charges against the bond funds in question, but that the amounts were not set up in the 1926 Appropriation Bill. The memorandum also states that "new accounts cannot be established at this time." This latter sentence is not strictly correct from a legal standpoint, although it may be in harmony with the policy adopted by the City Council and your committee.

The memorandum, however, goes on to say that the items requested in connection with the Ashland avenue bond fund may be charged to Account 469-S-57, which is a general appropriation for other expenses to be determined by the City Council. It also says that the items of expense required for the South Water Street Improvement may be charged against Account 469-S-83, which is a similar appropriation. The memorandum then says that there is no separate account to which the Western avenue items can be charged, and it suggests that authority be granted to charge these items to appropriations heretofore made under that bond fund. In pursuance of this last recommendation, the City Council authorized drawing against Accounts 469-B-30, 469-B-32, 469-S-32 and 469-S-34.

The recommendation of the staff with regard to Ashland avenue and South Water street is entirely proper, but we know of no way in which we can properly draw against the accounts indicated for paying the expenses of the Western Avenue Improvement that you are seeking to pay. The particular accounts referred to are for the preparation of ordinance plans for bridges, viaducts, etc., for employment of special counsel, for clearing away obstructions and for barricades and temporary sidewalks. These are all specific appropriations, and as a strict matter of law there is no way of expending that money at the present time for commissioners' fees, court reporting and miscellaneous expenses.

We would suggest, however, that since it is not in keeping with your policy to make appropriations for these purposes from the general corporate fund and the Western avenue bond fund is completely exhausted by appropriations already made, and since the appropriations might have been properly made from the Western avenue bond fund in the first instance, the commissioners' fees and the miscellaneous expenses and cost of court reporting may for the present be paid out of the accounts named, and at some time in the future the necessary readjustment might be made. We recommend this because the amount involved is small and no serious consequences can follow.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Mechanical Ventilation of Rooms in Office Building.

March 30, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

This will acknowledge receipt of your letter of March 9th as to the proper application of the council order passed March 18, 1926, which reads as follows:

“Ordered, that the Commissioner of Buildings and the Commissioner of Health be and they are hereby directed to issue a permit to Joy Morton by which all the rooms in the building located on the premises at the northwest corner of Wells and Washington streets not having a window or windows opening directly on a

street, alley, yard or court, or in which the window opening is not one-tenth of the floor area of the room, shall be mechanically ventilated by a system which will effect six changes of air per hour, full credit being given for the window openings and the excess only ventilated on the basis stated above, according to plans on file in the offices of the Commissioner of Buildings and the Commissioner of Health."

There is an inconsistency, you state, inasmuch as the council order refers to mechanical ventilation in rooms in which there are no windows, and at the same time relates to the issuance of a permit according to the plans on file, which plans show anterooms or reception rooms ventilated by transoms.

"The obvious intent," you add, "is that certain rooms where there is insufficient window area shall have the ventilation supplemented by mechanical means, the anterooms or reception rooms to be treated as is customary, that is, ventilated by means of transoms."

You wish to be advised whether you would be justified in construing the above order according to its intent as evidenced by the plans on file in your office or whether you are to observe its strict phraseology.

The sole question presented to us is the proper interpretation of the above order according to recognized rules of legal construction, and not its force or validity.

Acts of lawmaking bodies should be construed according to their intent or object (191 Ill. 257). The intention prevails over the letter of the act (152 Ill. 546). The literal meaning of words may be departed from where construction would result in contradiction (84 Ill. 626), and literal meaning may also be departed from to avoid absurdity (232 Ill. 312).

Omission may be supplied and law extended to what it was manifestly intended to embrace (161 Ill. 412).

It is our opinion that you are justified in interpreting the above order according to its intent as evidenced by the

plans on file, and that you are not bound by its literal meaning where the literal meaning conflicts with the manifest intent of the order.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Extension of Time on Traffic Signal Light Contracts.

March 30, 1926.

HON. ROSS A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

You have made inquiry concerning the validity of the two proposed orders which were recommended for passage on March 3, 1926 (Council Journal, p. 2682), whereby the time for the completion of the contracts of Leitelt Bros. and the Harrington-Seaberg Corporation would be extended. You state that you have since been advised of a liquidated damage clause in these contracts under which the contractors would be subject to deductions on account of delay, and you want to know whether such extension can now lawfully be made, and if so what procedure should be followed.

There is no doubt that such liquidated damage clause can be enforced if the delay beyond the specified time is due to the fault of the contractor. If, however, the City caused the delay it is excusable, and a release of the obligation may properly be effected.

Inasmuch as the extension of time was recommended by the Commissioner of Gas and Electricity, we called on him

for some explanation as to why he wished this done. In his reply he states that the executed copies of the contracts were not delivered to the manufacturers until five weeks after the date of the award of the contract. While the specifications required that the date of delivery was to be reckoned from the date of the award, the contractors were reluctant to proceed with their contracts until they received these signed copies. They were held up pending a determination as to what should be done with a patent infringement suit that had been started.

The Law Department had considerable to do with this delay in turning over the signed contracts. We deemed it essential to have a complete understanding with regard to the liability of these contractors concerning this infringement suit. Hence, we have no hesitation in saying that the contractors should be credited with these five weeks. In other words, it would be entirely lawful for the City Council to extend the time for the completion of the contract for such period.

The Commissioner of Gas and Electricity also states in his letter and a subsequent memorandum obtained from him that the contractors were required to withhold manufacture of the equipment until the approval of certain features concerning which there were some new developments, and that the department was compelled to take considerable time in placing its approval on the samples of equipment submitted, one of the contractors being held up six weeks on account of a change of design. The commissioner feels, under the circumstances, that the contractors are entitled to the extra time for this reason. Inasmuch as a large discretion is vested in the commissioner, and he found it necessary to delay the approval of the equipment in the exercise of that discretion, through no fault of the contractors, due allowance should be made for that.

We find that on Contract No. 8046, entered into with Leitel Bros., the instrument is dated September 24, 1925, but was not signed by the Mayor until October 29, 1925,

and it was delivered to the contractor on October 30, 1925. There was a further delay of two weeks on the approval of the signal lights, due to the change of design on the part of the work of the other contractor. This gives the contractor the right to an extension of 50 days, or up to and including January 21, 1926, at which time we are informed final delivery was made.

In the case of Contract No. 8061, entered into with the Harrington-Seaberg Corporation, the award was made on October 9, 1925, but the contract was not signed by the Mayor until November 20, 1925. It was delivered to the contractor on November 22, 1925. The commissioner says as to this contract, "the controllers to be furnished under this contract had to be changed slightly as to design, as these articles were something new in the art of traffic control, and we had to feel our way in the manufacture of same. It was necessary to approve the different designs which were changed from time to time and then send them back to the contractor. This delay, which was unavoidable, consumed about six weeks." This gives the contractor the right to an extension of 86 days, which brings the time beyond March 4, 1926, at which time we are informed final delivery was made.

We are, therefore, of the opinion that the contractors should be allowed the additional time for the fulfillment of their contracts without having the liquidated damage clause apply. We have drafted two orders which will carry into effect such extension of time if passed by the City Council. We submit said orders herewith for your consideration.

Very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Installation of Oil Tanks Underground.

March 31, 1926.

HON. JOSEPH F. CONNERY, Fire Commissioner.

Dear Sir:

This will acknowledge receipt of your letter of March 26th.

Application was made, you state, on July 7, 1925, by the Chicago, Milwaukee and St. Paul Railway Company signed by T. C. Kyle, lessee of property 1064-1080 Hooker street, to install two 25,000 gallon tanks to be used in storing fuel oil; that the tanks were to be above ground and diked; that the application was approved as to site by your department; that frontage consents were submitted which showed a surplus of 477.49 feet; that permit was issued by your department to install and dike said tanks.

It appears that thereafter and on March 12, 1926, upon final inspection of the installation of the tanks, it was observed that under Section 2303 of the code the tanks should be installed underground instead of above ground; that thereafter you notified the National Fuel Oil Company, the owners of the station, to discontinue at once all work on the above ground tanks. That on March 16, 1926, the said company advised you that contract had been let and work started on the diking of the tanks.

"These tanks," you add, "if diked above ground would lie approximately 551 feet south of Division street and within the prohibitive boundaries as set forth in the section referred to."

You wish to be advised whether you may legally revoke the permit.

While the situation is an exceedingly unfortunate one, the law in reference thereto is free from doubt. If the or-

dinance prohibits, as you state it does, above ground tanks at this location, you were without authority to issue the permit for their installation, and such a permit could confer no rights of any kind.

Probably the leading case upon the subject in Illinois is *Burton v. City of Chicago*, 236 Ill. 391. In that case the court said:

"It is claimed that the appellant having, through the commissioner of public works, granted the permit and accepted the bond and compensation from appellee, is estopped to deny the validity of the permit. It is conceded that the city had the authority to grant a permit to make the excavation and construct the vault in question, but the commissioner of public works had no such authority. On the contrary, the ordinance prohibited his doing so. The appellee, in applying for the permit, must be held to have known the commissioner had no power to grant it. The permit itself purports to be issued in pursuance of the ordinances of the city, and the bond given by the appellee is conditional for keeping the sidewalk in repair and for a compliance with the ordinances of the city regulating the use of space underneath sidewalks. The agent of a municipal corporation can no more bind the corporation in its private corporate capacity beyond the authority conferred upon him than an agent of an individual can bind his principal beyond his authority. The mere issue of the permit gave no right to appellee, because the commissioner of public works was without authority to issue it. * * *

It is alleged that the appellee has begun the excavation of the alley, has had plans prepared looking to the construction of its building and the occupation of the space under the alley in connection therewith, and has let its contracts for construction and ordered building material in contemplation of using the space under the alley, and that it will be put to great expense if it cannot use such space and is obliged to change its plans. This action of appellee was, however, taken on its own responsibility, relying upon an invalid permit issued at its own instance without any authority, and was not induced by any action of the city or any of its officers, or even, so far as appears, with their knowledge."

The doctrine announced in the above case was re-affirmed by the Supreme Court in the recent case of *Rippinger v. Niederst*, 317 Ill. 315. In that case the Commissioner of Buildings had issued a permit for the erection of a garage without frontage consents. The Supreme Court said:

“Under the ordinance the building commissioner had no authority to issue a building permit without the consents required by the ordinance. He appears in this cause only in his official capacity, as representing the city. The estoppel, if such existed, would be an estoppel against the city by reason of the action of its agent, the building commissioner. The permit was invalid and the commissioner had no authority whatever to issue it, and to hold that the actual parties in interest here could not in such a case recover because a co-complainant without actual interest could be estopped would be a far too technical application of the rule referred to in the *Girard* case. Moreover, the city cannot be estopped by an act of its agent beyond the authority conferred upon him. (*Burton Co. v. City of Chicago*, 236 Ill. 383.) This contention cannot be sustained.”

In view of the foregoing, we are of the opinion that if the installation of these above ground tanks is in contravention of the ordinances of the city, you may legally cancel the permit therefor, which you had no authority under the law to issue.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Regulation of Homes for the Care of Children Operated Under State Licenses.

April 1, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

In your communication addressed to the Corporation Counsel concerning the operation of homes for the care of children, you state: "Private individuals are operating homes for the care of children under state licenses. The Department of Health has requested that these individuals comply with Sections 1873 to 1886 inclusive, of The Municipal Code of 1922." You then request an opinion as to the power of the Health Department to close these places for failure to comply with the provisions of the foregoing ordinance.

In and by an act of the Legislature, entitled "An Act to define and regulate homes for children," approved June 28, 1919, in force July 1, 1919 (Chapter 23a, Illinois Revised Statutes), it is provided in Section 1 thereof that "It shall be unlawful for any person, firm, association or corporation to conduct a boarding home for children under sixteen years of age without a license issued as herein provided."

Section 2 of said act exempts certain institutions from the provisions thereof, and Section 3 defines keepers of boarding homes, as follows:

"A person, firm, association or corporation shall be deemed to be the keeper of a boarding home for children if, for hire, directly or indirectly, he or it,

(1) Advertises or holds himself or itself out as conducting a boarding place for children under sixteen years of age, or

(2) Has in his or its custody or control two or more children under sixteen years of age unattended by

parents or guardians, for the purpose of providing such children with care, food or lodging."

Section 4 provides for the issuance of a license by the Department of Public Welfare of the State of Illinois, and fixes the license period.

Section 6 of said act provides that "Every holder of a license to conduct a 'boarding home for children' under this Act shall maintain standards as follows:

1. The food provided for the children must be clean, wholesome and suitable in amount and character to the needs of the children;

2. Children shall receive kind and humane treatment;

3. Provision must be made to adequately safeguard the health of the children;

4. Provision must be made for the children's education equivalent to that required by the public school laws of the State;

5. No practice or influence detrimental to the moral welfare of the children shall be permitted to exist on the premises;

6. The buildings and the equipment in which children are cared for must be sanitary and in no way endanger the lives or welfare of the inmates;

7. In the release of children from the 'boarding home' due regard must be given the future health, comfort, education and welfare of the children so released.

8. The care, treatment and discipline of the children shall be as far as practicable equivalent to that given children of worthy parents in the average normal family."

Section 7 of said act provides for the inspection and examination of the records of each and every "home" by said Department of Public Welfare, and Section 8 provides for the promulgation of rules by said Department of Public Welfare "relating to the enforcement of the provisions of this Act."

Section 9 provides the method of revocation of licenses, and Section 10 fixes the penalty for violation of any of the provisions of said act.

In 19 R. C. L., Section 110, page 803, the author says: "A municipality cannot lawfully forbid what the legislature has expressly licensed, authorized or required, or authorize what the legislature has expressly forbidden." Citing, among other cases, *Wilkie v. Chicago*, 188 Ill. 444.

And continuing, the author says: "The mere fact that the state, in the exercise of the police power, has made certain regulations does not, however, prohibit a municipality from exacting additional requirements. So long as there is no conflict between the two, and the requirements of the municipal by-law are not in themselves pernicious, as being unreasonable or discriminatory, both will stand, but municipal authorities, under a general grant of power, cannot adopt ordinances which infringe the spirit of a state law, or are repugnant to the general policy of the state." (19 R. C. L., Sec. 111.)

Municipal ordinances must be in harmony with the general laws of the State and in case of a conflict the ordinance must give way, but the mere fact that the State has legislated upon a subject does not necessarily deprive a city of power to deal with the same subject by ordinance. (*City of Chicago v. Ice Cream Co.*, 252 Ill. 311.)

The City of Chicago has power, under Section 78 of Paragraph 65 of the Cities and Villages Act (Chap. 24, Ill. Rev. Statutes), "to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease." One of the most important of police powers is that of caring for the health of the community. The power to regulate confers the powers to license. (*City of Chicago v. Drogasawacz*, 256 Ill. 34, and cases therein cited.)

In and by Section 1873 of The Chicago Municipal Code of 1922 relating to "Homes," it is provided that "For the purpose of this article a home is hereby defined to mean any institution, place or family used for the reception or care, for a longer period than twenty-four hours, of three or more infants or children apart from their parents. A home is

further defined to mean any institution used for the reception or care of persons who are dependent or not capable of properly caring for themselves, and shall be understood to include homes for the aged or infirm, orphan asylums, half-orphan asylums, refuges and shelters, and also boarding homes caring for three or more women with their children when such children are less than fourteen years of age."

Section 1874 of said ordinance provides that it shall be unlawful for any person, firm or corporation (other than those excepted). "to open, conduct, manage or maintain any home, as defined in this article, within the corporate limits of the city, without first obtaining a license therefor as hereinafter provided."

Section 1875 relates to the form and contents of the application for such license, and Section 1876 provides that "the building or buildings used as a home shall comply with the requirements of the department of buildings and bureau of fire prevention and public safety."

Section 1877 provides for an inquiry to be made by the Commissioner of Health concerning the facts set forth in such application for a license, and for his recommendation to the Mayor based upon the result of such inquiry, and that upon his recommendation and payment of the license fee the Mayor shall issue or cause to be issued a license attested by the City Clerk. Section 1878 fixes the license fee at the sum of one dollar, such license to expire on December 31st following the date of issuance.

In addition to the requirements of the statute relating to homes for children, hereinbefore referred to, Section 1879 of the ordinance provides: "In every such home each room occupied or to be occupied by inmates shall be of such dimensions as shall give each inmate not less than four hundred cubic feet of air space. Every such room shall have at least one window connecting with the external air for each four beds. Said windows shall be of such dimensions as shall secure to each inmate at least one thousand five hundred cubic feet of fresh air per hour by natural ventilation,

or in case said window shall not secure said one thousand five hundred cubic feet of fresh air per hour by natural ventilation, then each room shall, in addition thereto, be fitted with such appliances for ventilation as shall secure to each inmate in said room at least one thousand five hundred cubic feet of fresh air per hour. Each bed shall have at least forty square feet of floor space, and in every room or dormitory containing more than one bed the beds shall be so arranged as to leave a passageway of not less than two feet horizontally on all sides of each bed."

"Each ward or wing in said home shall have running water furnished in one or more places, either in said ward or convenient thereto, so that the same may be adequate and convenient to occupants thereof. The plumbing, water-closets, bath-rooms and other sanitary appliances and equipment shall be constructed in accordance with the city ordinances relating thereto. The floor of the cellar or basement in any building used as a home shall be properly cemented so as to be water-tight."

"The halls of each floor shall be open to the external air with suitable windows, and shall have no room or other obstruction at either end thereof, unless sufficient light or ventilation is otherwise provided for such halls, and the buildings as a whole shall be provided with adequate and proper fire escapes, stairways or inclines for exits."

"All homes, including the culinary department, dining rooms, laundry, laboratory, morgue and post-mortem rooms connected with the same, shall be equipped from May 15th to November 15th with doors, screens and other appliances necessary for the exclusion of flies."

Section 1880 provides for the isolation of contagious disease cases, and Section 1881 provides for the securing of frontage consents prior to the construction or maintenance of a "home" as defined in said ordinance. Section 1883 provides for the keeping of a record of all inmates and gives in detail the nature of the record to be kept, and provides for the inspection of such record by the Commissioner of Health.

Section 1884 relates to reports to be made to the Commissioner of Health, daily, and Section 1885 relates to the reports to be made of the disposition of infants or children. Section 1886 provides for the inspection of such "homes" by the Commissioner of Health whenever and as often as he may deem proper, and provides for the revocation of licenses for violation of any of the ordinances or regulations of the City of Chicago or statutes of the State of Illinois.

Clearly, by its terms this ordinance is not a revenue measure, but one to regulate "homes" as defined therein, and the sanitary conditions under which they are maintained and operated.

From a consideration of the foregoing ordinance in connection with the provisions of the statute, I am of the opinion that they are not in conflict with each other. It is apparent from a most casual reading that the ordinance merely provides additional safeguards to those imposed by statute, and was ordained for the purpose of better regulating the "homes" in question.

The ordinance does not purport to authorize the closing of such "homes" except upon conviction for a violation thereof, but Section 1887 provides a penalty for such violation which may be enforced by an action of debt for the penalty prescribed therein, and upon such conviction such "home" may be closed.

Respectfully submitted,

ROY S. GASKILL,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Safeguards Against Collision of Vehicular Traffic with Elevated Posts and Columns.

April 1, 1926.

HON. ROBERT E. BARBEE, Alderman, 17th Ward.

Dear Sir:

Your letter of February 10th last, requesting this office for an opinion as to the power of the City to enforce an ordinance passed December 12, 1923 (C. P. 1923, p. 1419), requiring the owners of elevated railroads to provide certain safeguards against collision by vehicular traffic with elevated posts or columns, is received.

In reply, we beg to advise that in our judgment the subject-matter and purpose of the ordinance come within the rule announced by the Supreme Court of this State in the case of *Northern Trust Co. v. Chicago Railways Co.*, 318 Ill. 402 (opinion filed October 28, 1925), wherein that court held the requirement of headlights on street cars was no longer a matter of local regulation, but one within the scope and jurisdiction of the Illinois Commerce Commission.

In an extended opinion in that case, the court following closely the reasoning of its opinion in the earlier case of *Village of Atwood v. C. I. & W. R. R. Co.*, 316 Ill. 425, held that the power of municipalities to prescribe safety regulations for common carriers had been repealed by the Commerce Act and that the powers theretofore vested in the City Council of cities over such matters are now vested in the commission.

It is our opinion that this decision would be held to apply to the ordinance in question if a test were made.

We have in the past few days, however, submitted a draft of a suggested order, to the commission, that we have asked them to enter and adopt. This order would have the

effect to continue in force all the police ordinances of the City passed under authority of the Cities and Villages Act, prescribing safety devices, lights, signals, etc., on street railways, as the order of the commission, until such time as the commission may enter specific orders in particular cases. We are suggesting a modification of the order, as submitted, to include steam and elevated railroads. If the order is entered, as suggested, it will revive the ordinance as the order of the commission, but the City will be powerless to enforce it, except upon application to the commission, which would be the sole enforcing body.

If such an order is entered, we will advise you, so that the necessary steps may be taken to see that it is enforced in the particular instance concerning which you inquire.

We think we ought to say that we seriously question the validity of this ordinance, without any reference to its repeal by the Commerce Act, but its terms and provisions might be valid if ordered by the commission. One portion of the ordinance is clearly meaningless. It requires the owners or operators of steam or elevated roads "to paint *or* stripe" of uniform color all posts, supports, etc. The ordinance purports to be a safety measure, and it was undoubtedly the intention that posts, pillars, etc., should be painted a bright, conspicuous color so as to be clearly visible at night. But under the ordinance as passed, they might be painted black as long as they are uniform.

With regard to the light provision, we have previously held in former opinions that the City could not compel the railroads to illuminate the streets for the benefit of pedestrian and vehicular traffic, although prior to the Commerce Act it could require the illumination of posts and pillars that constituted an obstruction in the street.

Yours very truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Regulation of Practice of Pharmacy.

April 3, 1926.

HON. HERMAN N. BUNDESEN, M. D., Commissioner of Health.

Dear Sir:

Your communication addressed to the Corporation Counsel relative to the amendment to Sections 1 and 3 of an act regulating the practice of pharmacy in the State of Illinois (Chapter 91, Paragraph 51, *et seq.*, Illinois Revised Statutes), and concerning the duties of the Commissioner of Health under Section 1105 of The Chicago Municipal Code of 1922, has been referred to the undersigned for consideration and reply.

In your communication you state: "Inasmuch as this new provision of the statute provides for certain qualifications of the members of a partnership and of the officers of a corporation purchasing, leasing, acquiring or establishing a drug store, I should be pleased to be informed whether it is the duty of the Commissioner of Health to enforce these provisions; the question at issue being whether such control and supervision by the Department of Health is mandatory under Section 1105 of the municipal code or any provision of the statute."

"Also, if this is not the duty of the commissioner of health, then to what governmental agency shall complaints relative to the violations of this provision be referred."

"In the event that you find that there is a state agency charged with the enforcement of these provisions, will it then be necessary to get approval from such agency before an application for a drug store license is approved by the city?"

An answer to the foregoing requires consideration of the powers delegated to the City under and by virtue of the pro-

visions of the Cities and Villages Act (in force July 1, 1872, and all amendments thereto), Chapter 24, Illinois Revised Statutes.

Our Supreme Court, in the case of *Lowenthal v. City of Chicago*, 313 Ill. 190 (hereinafter referred to), has held that so far as is appropriate, the regulation of the drug business by the provisions of the Pharmacy Act and the Criminal Code is ample, and the passage by a city council of an ordinance licensing and regulating the operation of drug stores is unnecessary and unauthorized.

The legislature may delegate to municipal corporations, for the purposes of local government, such portion of its power as it sees fit and revoke the same at its pleasure. (*Arms v. City of Chicago*, 314 Ill. 316.)

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily implied or incident to the powers expressly granted; and third, those essential to the accomplishment of the declared objects and purposes of the corporation. (*Consumers Co. v. City of Chicago*, 313 Ill. 408.)

The implied powers of a municipal corporation are only those necessarily incident to the powers expressly granted. (*Arms v. City of Chicago*, *supra*; *City of Rock Island v. Nolan*, 316 Ill. 60.)

Any fair or reasonable doubt concerning the existence of the power of a municipality must be resolved against it and the power denied. (*Consumers Co. v. City of Chicago*, *supra*; *Arms v. City of Chicago*, *supra*; *Aberdeen-Franklin Coal Co. v. City of Chicago*, 315 Ill. 99.)

In the case of *Lowenthal v. City of Chicago*, 313 Ill. 190, a bill was filed by Lowenthal and others, as owners of retail drug stores in Chicago, which were operated by registered pharmacists or registered assistant pharmacists, to enjoin the City of Chicago, *inter alia*, from enforcing an ordinance which provided for licensing and regulating the sale of drugs and such articles as are commonly sold in drug stores, pre-

venting such stores being maintained and operated in an unsanitary manner, providing for a penalty for failure to comply with the provisions of the ordinance, and providing an annual license fee of \$25. The cause was heard on bill and answer, and the court entered a decree granting the injunction, holding the ordinance null and void and restraining the City and its officers from enforcing it, but also holding that the restraining order "should not affect the right of the city to grant permits to druggists for the sale of liquor for medicinal, mechanical, sacramental and chemical purposes, subject to forfeiture and under such restrictions and regulations as may be provided by ordinance," and the court at page 193 said:

"The act enacted by the legislature to regulate the practice of pharmacy provides for registration of any person personally conducting a pharmacy or drug store and provides a penalty for violation of the act. A drug store or pharmacy is defined as a place of business where drugs, medicines or poisons are compounded, dispensed or sold at retail. The qualifications of a registered pharmacist are prescribed * * *. An examination must also be passed before the Department of Registration and Education, after which the applicant is given a certificate upon payment of \$10, which is renewable annually on the payment of an additional fee. The qualifications of assistant registered pharmacists are also prescribed * * *. The act provides for the method of labeling drugs, medicine or poison, * * *. Penalties are provided for adulterating drugs and substituting preparations, and restrictions are made as to the sales of opium and the like. (Smith's Stat. 1923, pars. 36-55, pp. 1328-1332.) There are provisions in other parts of the statute as to manufacturers and druggists keeping copies of permits for the sale of liquor, and there are further provisions under the Criminal Code as to the labeling and sale of poisonous drugs, the sale of wood alcohol, abortifacient drugs, coloring and adulterating drugs and medicines, which provisions are not necessary to be set forth in detail.

"The legislature has not in so many words conferred upon the city the right to regulate or license drug stores. The subject of drug stores is not mentioned in the Cities and Villages act, except that clause 46 of sec-

tion 1 of article 5 provides that the city council may grant permits to druggists for the sale of liquor. In the Pharmacy act it is provided that nothing in the act will prevent any person or persons owning a drug store or pharmacy from employing and placing in active and personal charge of the same a registered pharmacist.

“Neither a municipal corporation nor the legislature may interfere, under the guise of a police regulation, with the liberty of the citizen in the conduct of his business, legitimate and harmless in its essential character, beyond a point reasonably required for the protection of the public. It is for the judiciary to ascertain and declare the limitation. (*Condon v. Village of Forest Park*, 278 Ill. 218; *Munn v. Illinois*, 94 U. S. 113; 7 McQuillin on Mun. Corp. sec. 893.) Things which may or may not be injurious to the public, according to the manner in which they are managed, conducted and regulated, may be licensed for the purpose of regulation. (*Condon v. Village of Forest Park*, *supra*.) The legislative powers of municipal corporations are strictly construed, and if there is any fair and reasonable doubt as to the existence of a power, the doubt must be resolved against the municipality claiming the right to exercise the power and the same be held not to exist. (*City of Chicago v. Ross*, 257 Ill. 76; *People v. City of Chicago*, 261 *id.* 16.) If the business sought to be regulated has no tendency to injure the public health or morals or interfere with the general welfare it is not a subject for the exercise of the police power. (*People v. City of Chicago*, *supra*; *People v. Ericsson*, 263 Ill. 368; *Town of Cortland v. Larson*, 273 *id.* 602.)”

And continuing at page 195 the court said:

“There is nothing about the conduct of a drug store requiring supervision which is not common to all stores where prepared foods and drinks are sold in packages or where stationery or other merchandise is sold. Those particular drugs and medicines, including intoxicating liquor, which are harmful or may be harmful unless their use is supervised, have already been made the subject of direct State legislation. Four years’ experience is required of a registered pharmacist, and specific qualifications and experience are required of registered assistant pharmacists for the very purpose of protecting the public and the customers of drug stores in the purchase of

their commodities. In addition to the specific qualifications required of those operating drug stores, there are definite State regulations concerning the dispensing of harmful drugs only upon physicians' prescriptions, so that we think the conduct of the drug business, so far as it requires regulation, is covered by State regulation, and inasmuch as the legislative provisions regarding the police power of cities are contained in one hundred separate clauses, in article 5 of the Cities and Villages act, in which regulation of drug stores is not provided for, the enumeration given is the exclusion of all other subjects. (*Potson v. City of Chicago*, 304 Ill. 222; *People v. City of Chicago*, *supra*.) * * * It is true that the legislature and municipality may both, as to proper subjects, legislate with reference thereto, but for the reasons heretofore stated the restrictions and license as to the operation and control of drug stores, in view of the State regulations existing, may not be imposed."

By reason of the foregoing ruling of the Supreme Court and the law as enunciated in the cases hereinbefore referred to, I am of the opinion that the City of Chicago is without power to license or regulate the business of owning or operating drug stores as defined by the statute.

Section 3 of the Pharmacy Act, as amended, makes a violation of said section a misdemeanor "punishable upon conviction by a fine of not less than \$20 nor more than \$100." Misdemeanors may be prosecuted by anyone having sufficient knowledge of the facts, by filing a sworn complaint or information in the Municipal Court of Chicago. The prosecution of such information when filed is conducted by assistant state's attorneys assigned to the several branches of said court engaged in the hearing of criminal cases.

By reason of the foregoing I am also of the opinion that the law imposes no duty on the Commissioner of Health to enforce the provisions of the statute regulating and licensing the business of owning or operating drug stores; that complaints in relation thereto should be made in the first instance to the Department of Registration and Education of the State of Illinois and to the State's Attorney of the particular county in which such violation occurs; that the Com-

missioner of Health in any city has no power to approve or disapprove applications for a state license to own and operate such drug business or store; that the powers of the Commissioner of Health in cities is confined to the enforcement of the ordinances and laws relating to the sanitary conditions under which such drug stores are operated, and that the cities and villages of Illinois have no powers concerning such drug stores, other than the enforcement of ordinances relating to fire protection, structural requirements and sanitation.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,
Acting Corporation Counsel.

Permits for Buildings Where Location Is Limited as to Use.

April 5, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

In your letter of recent date you call attention to an opinion rendered by this department on October 7, 1913, and appearing on page 475 of the Opinions of the Corporation Counsel and Assistants from January 1, 1913, to October 5, 1914. You ask whether anything has transpired since the writing of this opinion that would cause the same to be changed in any manner.

The opinion in question has to do with the issuance of building permits for theaters at places where Section 117 of The Chicago Code of 1911 prohibits the operation of such

a place of amusement or requires frontage consents before it can be so located. It was written in order to give notice to persons who desired to erect such places, that while we could not prohibit or prevent the erection of the theater it might not be possible under the law to issue a license for operating it, and it was thought that notice should be given before the permit was issued in such cases.

Since the writing of this opinion many things have happened which have considerable bearing on the subject-matter. Perhaps the most important of these things are the passage of the Zoning Enabling Act and the passage of the City Zoning Ordinance. These in themselves obviate the necessity of an opinion of the kind written in almost every instance that the question arises. Nevertheless, there are cases where the question may still arise.

Another thing that has happened that changes the status somewhat is the enactment of Section 933 of The Chicago Municipal Code of 1922. This section, as you know, requires the frontage consents to be submitted before the issuance of a permit, whether it is the building itself or the use to which it is put, that requires such frontage consents. Section 924 of the same code also relates to the same subject-matter, and Section 928 has a provision which may become operative on account of protest of property owners.

However, if we understand your question aright, what you really have in mind is whether or not the law now gives the City Council the power to control the location of a place of amusement independently of the Zoning Ordinance. In other words, if a person was determined to build a theater within the proscribed distance of a church, etc., and the place was in either a commercial or manufacturing district under the Zoning Ordinance, could he compel the City to issue him a permit even though the ordinances prohibit the issuance of a license therefor after the building was erected. Our answer to this is, that if he persisted in putting up his building the courts would probably compel the City to issue the permit. The reason for this is the same as that set forth

in the opinion that you refer to, viz., that the City cannot lawfully control the location of a place of amusement except through a Zoning Ordinance duly enacted as by statute required.

This would be the case in spite of ordinances that are designed to make it difficult for such a person to obtain a building permit that would ultimately leave a building on his hands which he could not use for the purposes intended.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Status of Water Meter Setters.

April 6, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of recent date, originated by the City Engineer, concerning the status of water meter setters, was referred to the undersigned for consideration and reply. It seems that the letter was called forth by an opinion written in this department a short time ago interpreting Sections 2945 and 4105 of The Chicago Municipal Code of 1922. (See *ante*, pp. 588-590.)

The opinion we refer to was in response to a letter from the Board of Examiners of Plumbers, who stated that there had been complaints regarding men other than licensed journeyman plumbers setting water meters for the City of Chicago. That letter also asked us to advise said board in re-

gard to the sections mentioned and as to what authority that board had in relation to the connecting and setting of water meters. We did not assume that it related in any way to regular employes of the City who had qualified as water meter setters by civil service examination. Neither was it assumed that the letter was to be understood as a decision or determination of a jurisdictional dispute between two trades unions.

A reading of both Sections 2945 and 4105 indicates that they were not intended to control the employment of regular City employes. Section 2945 requires plumbers to give bond in order to protect the City against violations of the City ordinances in making connections of pipes with the City water works system. Manifestly, this was not intended for employes of the City. Section 4105 requires that a person who makes connections with private supply pipes should be a duly licensed and bonded plumber, and the same inference must be indulged in with reference to that.

These sections were designed to protect the City's water system from improper workmanship on the part of persons who tap the pipes, and were not intended to control the employment of civil service employes. The examination and certification of water meter setters who are regular employes of the City rests with the Civil Service Commission. They are the ones who must pass on the qualifications of such employes, and the law requires that you should employ men certified by the Civil Service Commission in all cases of this kind. It is for that commission to determine whether a plumber or a machinist is better fitted for the place.

Yours truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Rights of Public and Rights of Municipality in Property Along Lake Front Between Sixteenth Street and the Mouth of the River.

April 7, 1926.

TO THE HONORABLE, the City Council of the City of Chicago.

Gentlemen:

Pursuant to your request to the Corporation Counsel for an opinion as to the legal possession rights, riparian and otherwise, of the people of the City of Chicago in all property lying in and along the lake front between the mouth of the Chicago river and East Sixteenth street, I respectfully submit the following:

There is an interesting line of opinions by the Corporation Counsel defining the rights, powers, interests and jurisdiction of the City of Chicago in the shore line property bordering Lake Michigan from approximately the City limits on the north to the City limits on the south, and defining the jurisdiction of the City in the waters of the lake adjacent thereto, some of which said opinions are as follows:

The right of the public of access to the waters of Lake Michigan at the foot of Clarendon avenue. (See opinion dated August 19, 1924, Opinions of Corporation Counsel, 1924-1925, page 400.)

As to the power of City to require compensation for landing of passenger boats at bulkheads, jetties and street ends. (See opinion of July 2, 1924, page 143.)

The jurisdiction of the City of Chicago and of the Lincoln Park Board of the foot of Bryn Mawr avenue and the lake, east of the retaining wall. (See opinion of April 24, 1924, page 27.)

As to the loss of the City's riparian rights appertaining to Clarendon beach by the construction of Lake boulevard

by the park commissioners. (See opinion of November 10, 1923, Opinions of Corporation Counsel, 1923-1924, page 454.)

As to the legality of the construction and maintenance of a bulkhead by the Admiral Hotel at the foot of Foster avenue, which cuts off access of bathers to the lake. (See opinion of May 11, 1923, page 144.)

As to the necessity for permits for construction work in the harbor where riparian rights have been relinquished. (See opinion of October 6, 1921, Opinions of Corporation Counsel, 1920-1923, page 367.)

As to jurisdiction of the City of Chicago in what is known as Grant Park. (See opinion of April 6, 1921, page 230; also opinion of July 14, 1914, Opinions of Corporation Counsel, 1913-1914, page 1016.)

The last two opinions above referred to give a comprehensive history of the title to the property known as Grant Park, and the substance of said opinions is hereinafter set forth in construing the rights and jurisdiction of the City of Chicago to the premises which are the subject of our present inquiry. A careful survey of all the above mentioned opinions affords a comprehensive outline of the questions now under consideration, and clearly defines the rights of the City in and to the lands along the lake shore.

In order to determine the respective jurisdictions of the City of Chicago and the South Park Commissioners in and to the territory known as Grant Park, it is essential to inquire into the respective titles and rights of said City of Chicago and said South Park Commissioners thereto, and to trace the respective sources of title in each.

Questions concerning the rights of the City of Chicago in and to the area known as Grant Park have been the subject of litigation on several occasions, both in our State and in the Federal courts.

In an original suit, entitled *People of the State of Illinois ex rel. Attorney General, complainants, v. Illinois Central Railroad Co. and the City of Chicago, defendants*, and

the *City of Chicago, cross-complainants v. Illinois Central Railroad Co.*, and the *People of the State of Illinois, cross-defendants*, the Circuit Court of the United States for the Northern District of Illinois, on September 24, 1888, entered a decree, which was affirmed by the Supreme Court of the United States in 146 U. S. 387, and which held that the fee in all public grounds in the City of Chicago, lying east of Michigan avenue, and between the north line of Randolph street, extended to Lake Michigan, and the north line of Block 23, extended, to the lake in fractional Section 15, Addition to Chicago, including the grounds upon which rests the tracks and the breakwater constructed by the Illinois Central Railroad Company, is in the City of Chicago, in trust for public use.

In the case of *United States v. Illinois Central Railroad Co.*, 154 U. S. 225, the Supreme Court discussed the question of the right of the United States to the lake front, and in so doing passed upon the question of title to such land. On page 234 of its opinion the court said:

“The question involving the title and right of the parties embraced in the cases, considered under the general designation of the *Illinois Central Railroad Company v. State of Illinois*, to the navigable waters of the harbor of Chicago and in the Lake Front property, and the encroachments on the harbor by the railroad company, and the validity of the Act of April 16, 1869, granting submerged lands in the harbor, were fully considered and settled as between the State and the City of Chicago, on the one part, and the Illinois Central Railroad Company on the other.”

And continuing at pages 241 and 242, the court said:

“It was also held in *Illinois Central Railroad v. Illinois*, that the ownership in *fee* of the streets, alleys, ways, commons, and the other public ground on the east front of the city bordering upon Lake Michigan, in fractional Section ten, was a good title, the reason assigned being that by the statute of Illinois the making, acknowledging and recording of plats operated to vest the title in the city in trust for the public uses to which the ground was applicable.”

The history of the title of the City of Chicago to the lands in what is known as Grant Park is given in several well known cases wherein Montgomery Ward prevented the erection of buildings on said Grant Park.

See *City of Chicago v. Ward*, 169 Ill. 392; *Bliss v. Ward*, 198 Ill. 104; *Ward v. Field Museum*, 242 Ill. 496.

All of the above cases are predicated on the proposition that the fee of the lands east of Michigan avenue, between Randolph street and Park Row, is in the City of Chicago.

We now come to a consideration of the relation of the South Park Commissioners to and concerning Grant Park.

On July 27, 1896, the City Council passed an ordinance giving consent to the South Park Commissioners to take, regulate, control and govern certain portions of the park. This ordinance was accepted by the Park Commissioners by a resolution adopted October 14, 1896. The General Assembly passed an act, approved June 11, 1897, reciting the passage of the ordinance and planning for a parade ground and armory. This was prevented by the decision in *Bliss v. Ward*, 198 Ill. 104. On April 24, 1899, the General Assembly passed an act reciting that the title to the land in question was still in the state, and enacted that the park should be called Grant Park. In the year 1901 the above act was amended and part of the park was conveyed to the South Park Commissioners. On May 14, 1903, the whole of Grant Park, bounded on the north by Randolph street, on the south by Park Row, and on the east by the lake, was conveyed to the South Park Commissioners to be held, managed and controlled by said commissioners in the same manner as other parks then under their control.

The question, therefore, of the respective rights of the City of Chicago and of the South Park Commissioners in and to the area known as Grant Park depends upon the respective titles of each, and the Supreme Court of the United States in *People of the State of Illinois ex rel. Attorney General v. Illinois Central Railroad Co. and the City of Chicago*, 146 U. S. 387, above referred to, decided that the title in fee

was in the City of Chicago; therefore, it continues to remain in the City, despite the acts of the Legislature, until, and unless, the City divests itself of such title. Hence the title of the City being in fee, the South Park Commissioners' jurisdiction therein was limited to the maintenance and control of the area in question for park purposes.

In addition to the above area known as Grant Park, there is a substantial parcel of land included in Harbor District No. 2, extending north from Randolph street to the Chicago river; also land lying south of the south boundary of Grant Park at Park Row, to a point four hundred feet south of Sixteenth street, extended. We now come to a consideration of the title to the last above described lands.

In and by Section 1699 of Article III of The Chicago Municipal Code of 1922, it is recited:

“The City of Chicago, having elected to exercise its right under the Act hereinafter named, reaffirms and ratifies such action, and confirms the said election and determination to exercise the right, power and authority granted by an Act of the General Assembly of the State of Illinois, approved June 23, 1913, in force July 1, 1913 * * *”

commonly known as the Harbor Act.

Section 1701 of said ordinance defines Harbor District No. 2 as follows:

“Harbor district Number 2 shall include all the territory including the public waters and all public turning basins, canals and slips, the submerged lands, the artificially made or reclaimed lands and other lands, lying and being within the following boundaries, to-wit:

“Beginning on the south side of the Chicago River at a point that is 3019.28 feet east and 1436.35 feet north of the southwest corner of east Randolph Street and North Michigan avenue, thence running in an easterly direction parallel to the south line of Randolph street extended east, over the waters of Lake Michigan, a distance of one mile, thence at right angles running along a line in a southerly direction to the said south line of Randolph street extended east, thence running in a westerly direction along the said south line of Randolph

street, extended east, *to the present shore or dock line of Lake Michigan, thence running in a northerly direction, but following the present dock lines of Lake Michigan, to the place of beginning.* (Italics ours.)

“All of the aforesaid public waters and all public turning basins, canals and slips, submerged lands, artificially made or reclaimed lands and other lands in said Harbor District number 2 are situated within the jurisdiction and corporate limits of the City of Chicago and are by this ordinance declared to be necessary or appropriate for the uses and purposes enumerated in said Act of the General Assembly mentioned in Section 1699.”

The present harbor or shore line was established in accordance with the approval of the Secretary of War, dated August 9, 1921. The act of the Legislature referred to in the foregoing ordinance (Chapter 24, Illinois Revised Statutes [Cahill], 1925, Paragraphs 1160-1184) provides in Paragraph 1171 thereof for the condemnation of lands upon public waters for the carrying out of the purposes of said act; also for the condemnation of submerged lands, and provides for an agreement as to boundary lines and for the entry of a decree by the Circuit Court confirming such agreement for such boundary lines; and Paragraph 1172 of said act provides *inter alia* that:

“The establishment of such boundary line as aforesaid shall operate as a conveyance and release to such city or village, of all the right, title and interest of such owner or owners to any and all lands, property and property rights, including riparian rights, lying upon the outer or water side of said boundary line when so established. Such city or village is hereby granted by the State of Illinois the title to any and all lands, property and property rights, including riparian rights, lying upon the outer or water side of said boundary line when so established. Such owner or owners of shore lands are hereby granted by the State of Illinois the title to the adjacent, adjoining or submerged or other lands, whether of natural or artificial formation, as specifically and particularly described in said decree, lying upon the inner or land side of said boundary line when so established, and such owner or owners shall have the right

to fill in, improve, protect and use, sell and convey said submerged or other lands lying upon the inner or land side of said boundary line free from any adverse claim in any way arising out of any question as to where the shore line was at any time in the past, or as to the title to any existing accretions.”

On July 21, 1919, the City Council passed an ordinance commonly known and referred to as the Lake Front Improvement Ordinance (Council Proceedings, page 969) in which all the land owned, occupied or used by the Illinois Central Railroad Company in the area north of Randolph street is fully set forth and described in Paragraph 4 of Section 1 of Article I of said ordinance. This land consists of approximately the area north of Randolph street, east of Beaubien court and south of the Chicago river extending east to the harbor line.

In Section 10 of said ordinance relating to Randolph street terminals and the reconstruction of east Randolph street viaduct, the legal description of the above mentioned lands of the railroad company is again set forth in Paragraph *d* of said section; and said section further provides:

“It is intended by this Clause *d* to settle any and all disputes between the City and the Central Company, (referring to I. C. R. R.) and between the City and the Michigan Central Railroad Company, as to the location of the eastern termini of River street, East South Water street and East Lake street, respectively, and it is agreed that said streets, and each of them, end at the western boundary lines of the lands in this Clause *d* of Section 10 described.”

From the foregoing ordinance and the above mentioned Harbor Act of 1913, as amended, it is apparent that there can be no serious dispute as to the land owned or occupied by the railroad companies in the above area.

With reference to the area south of Roosevelt road and east of the Illinois Central right-of-way, it is provided in Schedule III of said Lake Front Ordinance that the Central Company shall reclaim certain submerged lands as follows:

“All that area or parcel of land bounded as follows: On the *north* by a line One Hundred Eighteen (118) feet south of and parallel to the north line of east Roosevelt Road, extended east; on the *west* by the easterly shore line of the Central Company; on the *south* by the north line of East Forty-ninth Street, extended east; and on the *east* by the westerly line of the lands of the Commissioners.”

Then follows a minute description of the area to be reclaimed.

In and by Schedule IV of said ordinance it is provided that the South Park Commissioners reclaim certain submerged lands east of the above described lands to be reclaimed by the Central Company as aforesaid, which said area is described as follows:

“Beginning at the intersection of a line Four Hundred (400) feet south of and parallel to the center line, extended east, of East Sixteenth Street with the easterly line of the lands of the Central Company as described in Schedule III; thence east along said line Four Hundred (400) feet south of and parallel to the center line, extended east, of East Sixteenth Street to a point Three Thousand Two Hundred Seventy-three (3,273) feet east measured along said parallel line from the westerly right-of-way line of the Central Company; thence north Two hundred and Fifty (250) feet; thence east Twenty-seven Hundred (2,700) feet; thence north Three Hundred (300) feet; thence west Two Thousand (2,000) feet; thence north Two Thousand Three Hundred (2,300) feet; thence west Two Thousand (2,000) feet; thence north Four Hundred (400) feet; thence west to the easterly line of the lands of the Central Company; thence southerly along said easterly line of the lands of Central Company to a line One Hundred Eighteen (118) feet south of and parallel to the north line, extended east, of East Roosevelt Road; thence east along said line One Hundred Eighteen (118) feet south of and parallel to the north line, extended east, of East Roosevelt Road to the easterly line of the lands of the Central Company as described in Schedule III; thence south along said easterly line of the lands of the Central Company to the place of beginning.”

In and by Paragraph (d) of Article VI of said ordinance it is recited:

"The City hereby grants to the Commissioners the tract of land abutting on the shore of Lake Michigan, known as East End Park, and bounded approximately on the north by Hyde Park Boulevard * * * (and also certain other property therein described) * * * *also, insofar as it has lawful power and authority to do so, all other lands and submerged and reclaimed lands owned by the City and abutting on the shore of Lake Michigan between the Chicago River and East Sixty-seventh Street, extended east (except the land and submerged and reclaimed land now occupied by the Thirty-ninth Street pumping station and except the land and submerged and reclaimed land herein reserved for Harbor District No. 3), together with any and all riparian rights which the City may have between said Chicago River and said East Sixty-seventh Street, extended east.* If it shall appear that the City lacks power to grant to the Commissioners any of said lands, submerged or reclaimed lands or riparian rights, the City agrees hereafter to join with the Commissioners in a request to the General Assembly of the State of Illinois to pass such legislation as may be necessary to confer upon the City such power." (Italics ours.)

Any doubt as to the power of the City to make the foregoing grants to the Commissioners as recited in said ordinance has been removed by an act of the Legislature entitled "An Act concerning the powers of certain municipal corporations with respect to real estate," approved July 2, 1925 (Chapter 24, Paragraph 652, Illinois Revised Statutes [Cahill], 1925), Section 2 of which provides as follows:

"If the territory of any municipality shall be wholly within, co-extensive with, or partly within and partly without the corporate limits of any other municipality, and the first mentioned municipality (herein called 'transferee municipality') shall by ordinance declare that it is necessary or convenient for it to use, occupy or improve any real estate held by the last mentioned municipality (herein called the 'transferor municipality') in the making of any public improvement or for any public purpose, the corporate authorities of the transferor municipality shall have the power to transfer all of the right, title and interest held by it immediately prior to such transfer, in and to such real estate, whether

located within or without either or both of said municipalities, to the transferee municipality upon such terms as may be agreed upon by the corporate authorities of both municipalities, * * *,’”

Sub-paragraph (c) of Section 1 of said Paragraph 652 of said act provides that the term “municipality,” “shall mean and include a city, incorporated town or village whether organized under a special charter or under the General Act, or whether operating under the commission or managerial form of government, county, school districts and park districts or park commissioners.”

Section 34 of said Lake Front Ordinance provides:

“This ordinance and all of its provisions, when accepted by the Commissioners and the Central Company, and the railroad companies mentioned in Section 36 hereof, shall be taken and construed as a contract between the City, the Commissioners, the Central Company and said railroad companies, and by each one of them, with each and all of the others, * * *.”

The foregoing Lake Front Ordinance was amended February 5, 1920 (Council Proceedings, p. 1922), and acceptances were thereafter filed to said ordinance as amended, on February 18, 1920, as follows:

Document No. 250610—acceptance of Illinois Central Railroad Company, Kensington and Eastern Railroad Company, Blue Island Railroad Company, South Chicago Railroad Company, and Michigan Central Railroad Company.

On January 21, 1920, an ordinance of acceptance of the original ordinance of July 21, 1919, was filed with the City Clerk by the South Park Commissioners as Document No. 250470, and on February 10, 1920, the acceptance by said South Park Commissioners of the amendatory ordinance of February 5, 1920, was filed as Document No. 250609.

By reason of the foregoing I am of the opinion that the City has divested itself of the title to all lands and submerged and reclaimed lands owned by it and abutting on the shore of Lake Michigan between the Chicago river and

East Sixteenth street, extended east, together with any and all riparian rights which the City may have had therein.

Respectfully submitted,

ROY S. GASKILL,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Extras on Contracts for Extension of Street Lighting System.

April 9, 1926.

HON. JOHN T. MILLER, Commissioner of Gas and Electricity.

Dear Sir:

You have referred to us claims of the States Contracting Company set forth in eleven bills which they present for extras and damages on contracts Nos. 7928, 7976, 8019 and 8020. These eleven bills amount to a total of \$50,292.23. The contract price for the four contracts was \$603,000, and the same has been fully paid out of the electric street lighting bond fund.

You present with your letter a copy of contract No. 7928 which you say is representative of all four of said contracts. You also submit to us the bills for extras and the statement of the contractor regarding the same, and you ask for an opinion as to the City's liability in the matter.

We have before us only the statements made by the contracting company. We have no means of verifying these statements and will have to look to you for information as to each of the items for which claim is made before finally passing on any of them. What we say in this letter amounts

to a general opinion as to the liability of the City without taking up the details of the claim.

From our examination of the contract which you submitted, it appears that these contracts all require installations for lump sum prices. Where unit prices are specified the quantities given can be looked upon as only approximately correct, and unless there is an extraordinary increase which takes the contract out of its class to such an extent as to amount to an unfair award extra installation and extra material could be paid for at the unit prices. That is not the case, however, on these contracts.

The specifications on these contracts are drawn in such a way that it is clear the intention was to avoid claims for extras. Article 4 under the heading "General Conditions" specifically says that no extra work should be furnished or performed by the contractor except on receipt by him of a written order signed by the Commissioner of Gas and Electricity, and furthermore, that no extra work exceeding in value the sum of \$500 shall be furnished or performed until after action by the City Council thereon.

The Law Department has always taken the position that such a provision in the contract as the one just mentioned must be strictly lived up to. If extra work is performed on the necessary formalities prescribed in the specifications, it stands on the footing of a contract irregularly entered into, which may or may not be lived up to according to the circumstances. It is true that in many instances the contractor has recovered on such irregular contract by reason of the fact that the City has accepted work and has thereby estopped itself from refusing to pay for it. The rule which was in vogue in this state for many years and which was upheld finally in the case of *McGovern v. City of Chicago*, 281 Ill. 264 (which we have looked to as the last word of the Supreme Court on this subject) is that where a contract is irregularly entered into and the contractor has fully performed, the City is bound to pay on the *quantum meruit* for the material or work that it has accepted, that is to say, it is bound

to pay a reasonable price for what it has taken from the contractor on a completed contract. This principle of law may cut some figure in the disposition of the claims in question.

Another feature of the case before us is that a number of the bills are said to represent damages caused by the City involving such things as delay in the delivery of materials, improper specifications, etc.

While there is such a thing as the City being liable for damages for the matters mentioned, we feel that some of the items for which bills have been rendered were merely those incidental matters that are bound to come up in the execution of any contract of considerable size. We say this not only because the bills we speak of are for trifling amounts when compared to the size of the contracts, but they seem to be fully covered by the specifications. We have in mind for instance Article 2 under the heading "General Conditions" relating to approximate quantities, also the paragraph on the first page under the heading "Requirements for Bidding and Instructions to Bidders" relating to examination of the site. We could also mention other paragraphs and articles in the specifications that need not be gone into for the present.

Having indicated our position with respect to these matters in general, we will now take up the various items and state only in a general way, however, what our opinion is with regard to these claims.

Bill No. 1 calls for the sum of \$35,028 and is for extra pipe laterals installed. We can see no excuse whatever for performing this work and installing these extra laterals in the face of the explicit provisions relating to extra work appearing in the specifications. As the matter now stands, there is no authority whatever for paying this demand. If the City Council sees fit to approve this bill after investigating and determining whether or not it is a reasonable bill for the material and services, it will be treated as we suggest above, that is to say, it can be paid on the basis of its being a contract irregularly entered into on which the con-

tractor has fully performed his agreement and the City has accepted his work.

On bill No. 2 the demand for extra compensation is made on account of delay on the part of the City in the delivery of the materials. No explanation is given for the large sum involved (\$9,792). It is stated that the work was prolonged into the cold weather, that a certain ditch was left open which had caved in, and that the weather went below freezing and caused the backfill to freeze in lumps. If these matters can be substantiated, especially the responsibility for the delay, there may be a valid claim for damages, but we have nothing to say with respect to the amount.

Bill No. 3 is for the sum of \$3,957. It is stated with respect to this also that the extra expense was caused by delay on the part of the City in delivering material. In this instance it was some poles which were delayed. We are unable to say from the data given whether or not this is covered by the provisions in the specifications which relate to ignorance of the conditions on the part of the contractor. There is a possibility of the demand for damages being a valid claim, but we would not say so without further information.

Bill No. 4 is for the sum of \$238.50 for delivering poles to the site of erection. As we understand this claim, it is to the effect that the City delivered poles at the street intersections and it was necessary to move the poles to the site which each pole occupied. We believe that the delivery of the poles by the City at the street intersections was a substantial compliance with the contract and that no claim for damages ought to be allowed for this.

Bill No. 5 amounting to \$539.50 is for enlarging manholes. We know nothing about the value of this work, but in case the manholes were enlarged on the order of the Commissioner of Gas and Electricity a valid claim can be based on this extra work. It is within the discretion of the Commissioner of Gas and Electricity to add additional work of this kind, although that discretion is limited to \$500. It happens that this runs a little beyond the \$500, but probably

it would be allowed on the theory that when the order was given it was not expected to amount to so much.

Bill No. 6 calls for \$337.92 and it is said that it is for cutting and restoring newly laid concrete pavement at street intersections. It appears that the plans indicate the street crossings as unpaved, but when the contractor reached that part of the work he found the street newly paved. In case this paving was put down after the letting of the contract, the extra should be allowed to the extent that it is fair and reasonable, because that would be a clear case of the City compelling the extra work through its own acts. If, however, such pavement was down at the time that the bid was submitted, it was the duty of the contractor to observe that before making his bid. The specifications require this.

Bills No. 7, No. 8, No. 10 and No. 11 seem to be of the kind that we mention above, and represent work that we believe would naturally be encountered unexpectedly in contracts of this size; that is to say, the mere fact that when a cable is brought and it happens to be short and a new cable is to be put in its place, there is no ground for claiming an extra. This is one of the things that is likely to happen, and we believe the specifications require the contractor to take that into account.

Bill No. 9 calls for \$216 for replacing post foundations that are covered up by new sidewalks laid by the City, and also on account of the City Water Department undermining the post foundations of the contractor. This seems to be a valid claim, although of course we are not passing on either the amount of it or the correctness of the statement in regard to what was done by the City's employees.

We believe the above will indicate to you what your action should be with regard to each of the items mentioned.

Yours truly,

LEON HORNSTEIN,

Acting Corporation Counsel.

Rights of American Hospital Association in Residential District Under Zoning Ordinance.

April 9, 1926.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

This will acknowledge the receipt of your letter of March 25th with reference to the proposed occupation by the American Hospital Association of the premises located at 18-20-22 East Division street now used by the Chicago Latin School. The property has been purchased for \$125,000 by the American Hospital Association, and no structural changes are contemplated.

You transmit to us a communication from the American Hospital Association outlining its objects, purposes and activities and also a petition signed by neighboring property owners protesting against the contemplated occupancy of the premises by the association.

From the information submitted, it appears that the American Hospital Association was incorporated September 30, 1920, in Illinois as a corporation not for profit by the following persons:

Mr. Joseph B. Howland, Peter Bent Brigham Hospital, Boston, Mass.

Dr. Louis B. Baldwin, University Hospital, Minneapolis, Minn.

Dr. Louis H. Burlingham, Barnes Hospital, St. Louis, Mo.

Rev. Maurice F. Griffin, St. Elizabeth's Hospital, Youngstown, Ohio.

Mr. Richard P. Borden, 57 N. Main Street, Fall River, Mass.

Miss Mary L. Keith, Rochester General Hospital, Rochester, N. Y.

Dr. Robert J. Wilson, Division of Health, New York.

Mr. Asa S. Bacon, Presbyterian Hospital, Chicago.

Dr. A. R. Warner, 22 East Ontario St., Chicago.

The objects of the corporation as set forth in its charter from the state are "to promote the welfare of the people as far as it may be done by the institution, care and management of hospitals with efficiency and economy; to aid in procuring the co-operation of all organizations with aims and objects similar to those of this association; and in general to do all things which may best promote hospital efficiency."

The association has no stockholders, pays no dividends and no one can make any financial gain or profit out of the corporation. All of the income of the association is devoted to the corporate purposes above shown. The more money contributed to it, the more extensive become its research and other activities.

The association, it is stated, is supported by over two thousand individuals and over one thousand institutions. Ninety-five per cent of the institutions that are members of the association, it is claimed, are hospitals of an eleemosynary character. The remaining five per cent are hospitals which, while they do a considerable amount of charitable work, are either unincorporated or not of the class incorporated "not for profit," but such hospitals are required to furnish evidence of having done charitable work before being admitted to membership in the association.

The association does not conduct a hospital and is not directly engaged in the actual treatment of the sick, but the premises are to be used exclusively in the carrying on of the corporate purposes. Its activities are of a purely educational and advisory nature, and in the pursuit thereof it is engaged in studies and research for the solution of problems concerned with the organization, management, construction and equipment of hospitals.

The services of the association, it is asserted, are available to any hospital in the United States and Canada, and, in fact, to the world in so far as its income will permit. Its bulletins, transactions, studies and information service are free to any hospital or individual unable to pay the nominal charge requested, and the association annually sends to non-member hospitals throughout the United States and Canada bulletins and information without charge that it believes will be helpful to them. It gives away a great volume of literature to those who cannot afford to pay and to public and private institutions and libraries to disseminate to the public. Any public or private enterprise engaged in humanitarian or educational work may secure all of its literature free of charge by requesting it, even if they have not the funds to meet the cost.

Its work, it is stated, is for the benefit of all hospitals, and the scope of its bulletins and treatises shows that doubtless they are upon subjects of value to all hospitals. We quote the following from the association's communication:

"The bulletins of the association, while not intended to direct physicians in the performance of their professional functions, are, nevertheless, intimately related to the efficient care of the patient. A few instances will be given.

"BULLETIN No. 15: 'The Minimum Standard.' This bulletin embodies those standards of professional practice which, when observed, guarantee the best care of the sick, and when ignored make a hospital of questionable value. Its adoption safeguards the interests of every patient admitted to the hospital by insistence on competence on the part of the doctor and an efficient check-up on his accomplishments.

"BULLETINS No. 57 and No. 62: 'Food and Food Equipment.' The information contained in these bulletins is intended to assure the proper selection, preparation and service of food to the sick, and to aid hospitals in so equipping and arranging the food department that it will be possible to accomplish that aim.

"BULLETIN No. 58. 'X-ray Work.' There being much confusion amongst hospitals as to the proper equipment and operation of the X-ray, the association pub-

lished this bulletin, which involves the safety as well as the efficient application of this scientific device to the patients.

“BULLETIN No. 52: ‘Narcotics.’ The proper use and accounting of narcotics in hospitals is of great import to the sick therein, and this bulletin was published to enable hospitals to maintain a uniform practice, while conforming to the laws.

“BULLETIN No. 51: ‘Gauze Renovation.’ As a result of the studies and experiments conducted by the American Hospital Association it was found that a great financial saving could be made by the recovery of used gauze, and this bulletin describes the details. As a result of this work, many thousands of dollars have been saved to charitable institutions.

“BULLETIN No. 44: ‘Disinfection.’ The prevention of the spread of communicable diseases has always been one of our important problems, and in order to formulate some standards on this subject, this bulletin was published and it was thoroughly discussed at our conventions. As a result, uniform methods of disinfection have become almost universal and undoubtedly, many lives have been saved thereby.

“BULLETIN No. 33: ‘Venereal Diseases.’ This association has always been concerned with the proper care of the unfortunate sick, regardless of the nature of the disease, and this bulletin was published in the attempt to gain admittance to all hospitals of those suffering from venereal diseases. We believe that this has done much to reduce the prevalence of such diseases, and we know that many hospitals formerly closed to such cases now open their doors to them.

“All of these bulletins, as well as many others concerning the construction and administration, were conceived and published for the sole purpose of benefiting directly or indirectly the sick in hospitals as well as ambulant cases treated in dispensaries.”

The placing of competent persons in hospital positions is another endeavor of the association, but this service, too, is absolutely free to all hospitals and individuals that cannot afford to pay. This service, it is stated, alone means to the association a deficit of over one hundred dollars a month, and is conducted by correspondence.

Another activity of the association is the *Annual Convention*: All hospitals in America and many in foreign countries are invited. It is the custom of the association as well to invite to participate in its conventions various educational institutions such as colleges, universities and high schools, so that they and the public may be fully informed as to the needs of hospitals.

In addition, the association aids in the work of the Hospital Library and Service Bureau. This activity was organized to act as a clearing house for hospital literature and information, and is partly supported by the Rockefeller and Carnegie Foundations. The American Hospital Association was one of its founders, and contributes two thousand dollars a year toward the support of this work, which is free to all hospitals. The library, they hope, will be located in the proposed building.

In its studies the association co-ordinates with a number of other organizations working also on special hospital problems but all organized and incorporated like itself "not for profit," and the association has also invited the following organizations to share with it the proposed building:

American Association of Hospital Social Workers
(Staff consisting of Secretary and 2 assistants).

National Catholic Welfare Council
(Staff consisting of Director and 4 assistants).

Central Council for Nursing Education
(Staff consisting of Secretary and 1 assistant).

Hospital Dietetic Council
(Staff consisting of Secretary and 1 assistant).

In the proposed building, it is stated, there will not be over 25 persons altogether, including those engaged in the work of the co-ordinated bodies. There will be no printing presses operated there, as they have all their printing done on the outside. Neither will there be any employment office, as such is commonly known, conducted on the premises, but practically all the work as we understand it is done by correspondence.

The premises in question are in an apartment district across an alley from a commercial district. In determining whether the proposed use may be permitted in an apartment district, it is necessary to consider the provisions of the Zoning Ordinance. If only residential buildings were allowed by the Zoning Ordinance in apartment districts, there is little doubt that the proposed use of the premises by the American Hospital Association would be precluded. But in apartment districts the following uses are specifically permitted:

Dwelling house, golf or tennis grounds or similar use, church, convent, parish house, public recreation building, community center building, music school, university, public school, juvenile dancing school, private or boarding school or college (unless operated so as to bring it within the definition of a C use), public park, public playground, railway passenger station, tree or plant nursery, farm, truck garden, greenhouse (unless a retail business), railway right of way not including yard tracks or industrial tracks, apartment house, boarding house, lodging house, hotel (within the limitations in Apartment Districts imposed by the ordinance), public library, public museum, public art gallery, hospital or sanitarium, eleemosynary institution except as otherwise classified, private club unless a business.

The following special uses may also be maintained in residence and apartment districts:

Airdome, street car barn, cemetery, circus, carnival, carousel, open air or tent show, hospital, sanitarium, institution for the care of the insane or feeble-minded, penal or correctional institution, police or fire station, public service water reservoir, filtration plant, pumping station, public service or institutional light, heat or power plant, public utility gas plant, electric station or substation, telephone exchange.

It is claimed by the American Hospital Association that their proposed occupancy is that of an eleemosynary institution and therefore specifically permitted by the Zoning Ordinance in an apartment district.

We are informed that the Chicago Latin School which at present occupies the premises is conducted as a business en-

terprise. If that is true, it would make the present use of the premises commercial and a non-conforming use. Whether for that reason the American Hospital Association might occupy the building we need not consider because the contention made by the American Hospital Association is that their proposed use of the premises is that of an eleemosynary institution such as is specifically permitted in an apartment district.

We must first then determine the meaning of the term "eleemosynary." Eleemosynary has come in the law to be interchangeable with the word "charitable." (166 N. Y. S. 46; 113 Cal. 129.)

In the latter case of *People v. Cogswell*, 113 Cal. 129, the court said:

"Herein it is argued that 'eleemosynary' pertains exclusively to almsgiving; that alms are given to the poor; and that this trust is generally for 'the boys and girls of California,' and not specifically for the poor boys and girls. From this the claim is made that the Constitution never meant to permit perpetuities for strictly educational purposes, or the word 'eleemosynary' would never have been used. But is it for these reasons any the less an eleemosynary trust? It is quite true that the word 'eleemosynary' comes to us from the Greek word meaning 'alms,' but, while it is always interesting to note the origin and first meanings of words, this knowledge is frequently more curious than valuable; while to insist that the original meaning shall govern the word in its modern use and acceptance is very rarely permissible. It is in this way interesting to note that 'sycophant' comes from a Greek word meaning 'fig informer'; but it would scarcely be contended today that a man could not properly be called a sycophant unless he had dealings in figs. In short, words by use are sometimes degraded, sometimes ennobled; sometimes narrowed in meaning, sometimes broadened. 'Eleemosynary' has come in the law to be interchangeable with the word 'charitable.' A charitable trust or a charity is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some class forming a part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor.

It may, but it need not, look to the care of the sick or insane. It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. It is impossible to enumerate specifically all purposes for which an eleemosynary trust may be created. The difficulty is inherent in the subject-matter itself. With the progress of civilization new needs are developed, new vices spring up, new forms of human activity manifest themselves, any or all of which for their advancement or suppression, may become the proper object of an eleemosynary trust."

What then is a charitable institution? Charity, in the legal sense, is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification, which embraces the improvement and promotion of the happiness of man. A charity is a gift to the general public use which extends to the rich as well as to the poor. The test of a charity and the test of a charitable organization or institution are in law the same. The principal and distinctive features of a charitable organization are, that it has no capital stock and no provision for making dividends or profits, but derives its funds mainly from public and private charity and holds them in trust for the objects and purposes expressed in its charter. In other words, the test whether an enterprise is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit or private advantage. An institution does not lose its charitable character by reason of the fact that those recipients of its benefits who are able to pay are required to do so, where no profit is made by the institution and the amounts so received are applied in furthering its charitable purposes and those benefits are refused to none on account of inability to pay therefor (290 Ill. 108).

But the petition of the neighboring property owners against the use of the premises by the American Hospital Association urges that the use will be one that "can only be properly termed business purposes."

"While we have nothing," the protest avers, "but the highest respect for the Hospital Association and its aims and objects, as well as sincere appreciation of the good work it has done and will doubtless continue to do in promoting the usefulness and high standards of hospitals generally, we are informed and believe that the uses to be made by the Association of this property, upon obtaining possession thereof, will be distinctly commercial in their nature, and hence will not conform to the regulations of the Zoning ordinance for an apartment district."

The protest is based in large part upon an article by the executive secretary of the association, Dr. William H. Walsh, published in "The Modern Hospital" for the month of January, 1926. That article stated that the association in approving the new home had taken another step to establish a national center for hospital activities; that they expect to house in their new building other organizations devoted to affairs concerning hospital interests such as social service, welfare, occupational therapy, physiotherapy, dietetics and nursing education; that they will also locate in the new building the bureau for hospital personnel; that there will be established a research bureau presided over by a qualified director to carry out the many lines of research already started and others enumerated not yet commenced; that there will be appointed a director versed in legal affairs appertaining to hospitals; that a legislative bureau will be established; that the latter will not initiate legislation nor intercede in local affairs unless specifically requested.

The protest of the neighboring property owners contends that the above activities will bring to the premises daily hundreds of visitors and that the use of the premises call for what can only be termed business purposes.

As far as we can ascertain there will be no commercial use of the premises or business carried on there as those terms are commonly understood. They both impart activities, so far as the Zoning Ordinance is concerned, having more or less to do with trade or commerce for financial gain. It

is not pretended by the association that there will not be employes upon the premises or that people may not call at the rooms of the association in connection with its affairs. But that same objection applies, even in greater degree, to public libraries, museums, schools, hotels, lodging houses and other uses which unquestionably may locate in apartment districts.

Many uses other than residential or apartment—some even of a distinctly commercial character—are permitted in an apartment district, and the term “Apartment District” is merely a term of convenience. Also some of the uses permitted are uses that would undoubtedly be much more objectionable to a residential neighborhood from an aesthetic viewpoint than the proposed use of the building by the American Hospital Association.

We have little doubt that the courts would construe the use of the property by the American Hospital Association in the manner herein set forth and as we understand it, as that of an eleemosynary institution within the meaning of the Zoning Ordinance permitted in an apartment district—an educational institution for the promotion of the public health.

If the purpose of the American Hospital Association was simply to aid its own members in the way of enabling them to make more profits, we could not regard it as a charitable institution. It would then be a mutual benefit association, even though the public was indirectly benefited by its endeavors. But ninety-five per cent of the hospitals which aid in maintaining the American Hospital Association are of an eleemosynary character. Its purpose is educational and educational along the lines of the promotion of the public health, and such organizations are always favored by the law because they relieve the burdens of government.

In *American Asylum v. Phoenix Bank*, 4 Conn. 177, it was said that the establishment of an institution for the dissemination of learning has always been considered a charity. The donors thereof are in no event entitled to any profit which might arise from the enlargement of the funds of the

institution. Be they greater or less, they are consecrated to charity; and this decisively marks the eleemosynary character of the institution.

In *Webber Hospital Association v. McKenzie*, 104 Me. 320, the court held that the distinctive features of a charitable corporation are that (1) it has no capital stock and no provisions for dividends or profits; and (2) that it derives its funds mainly from public and private charity and holds them for its charitable objects.

In *Hearns v. Waterbury Hospital*, 66 Conn. 98, it was said that the absence of capital stock clearly indicates the charitable nature of the corporation.

In *Second Religious Society v. Harriman*, 125 Mass. 321, it was said that next to religion, education is the best means of human betterment. It unlocks to the inquirer the best thoughts of the best minds which the world has ever produced. It puts at the service of the scientist the experience of his predecessors. It gives to each succeeding generation a broader outlook in life. It enables physicians and surgeons to discover the reasons for various ills which afflict humanity. It dispels superstition and ignorance and is, therefore, so universally recognized that in all the discussion,—“What is a charity?”—there has never been a question but that it is a proper subject of a gift for charitable purposes.

In *Franklin v. Armfield*, 34 Tenn., the court held that the maintenance of educational institutions, therefore, is a charitable use without reference to the wealth or poverty of those who receive a benefit from them.

In *Washburn College v. O'Hara*, 75 Kans. 700, the court said: “The elevating and beneficent influences which the general public receives from educational sources make every citizen a beneficiary thereof, and furnish ample justification for placing every educational trust, not strictly private, and having increased learning for its object, in the category of public charities.”

Without further discussing cases, we will simply say, that education is a charitable purpose, has been recognized

by the statute of Elizabeth and has been entrenched and re-entrenched by numerous court decisions. Barring schools conducted as purely business ventures, gifts to all other schools, high and low, public and private, general or special, have always been upheld. Donors have been encouraged to create scholarships and endow professors' chairs, and these gifts to receive recognition as educational charities need not, however, be connected with any class room but may seek to spread knowledge by such means as the creation and support of libraries, museums, art institutes, historical societies, or by special gifts designed to further patriotism, woman suffrage, socialism, negro emancipation, medical science and the like.

However desirable it may be to retain the character of residential districts, it must be kept in mind that the Zoning Ordinance was passed under the police power by virtue of an act of the General Assembly which states in its preamble that its purposes are "to the end that the public health, safety, comfort, morals and welfare may be promoted."

There can probably be few more effective ways of promoting the public health than by providing knowledge and information at no expense to the public that is available to every hospital in the City, to the city authorities and to the public generally seeking to make more efficient and economical the conduct of hospitals, thus bringing about the amelioration of the condition of the sick in mind and in body therein.

We think further that the courts would hesitate a long time before they would decree that a district in which a hospital, lodging house, school, museum, or public library may be located, may not also have within it an institution not for profit consisting of a library and a few clerical assistants whose main function it is to study, probe, analyze and search out methods to promote general hospital efficiency and which cannot in the nature of things but redound to the interest of the public health.

It seems clear to us that the occupancy of the premises at 18-20-22 East Division street will be that of an eleemosynary institution within the meaning of the Zoning Ordinance.

The object of the American Hospital Association as stated in its charter is to promote the welfare of the people by more efficient and economical management of hospitals. Its work is accomplished by the dissemination of its pamphlets to the public and to all hospitals and institutions; by its annual conventions open to all the hospitals in the United States and to schools, colleges and universities besides; and the printed proceedings thereof which are similarly distributed. In some cases it does charge a nominal fee to help defer the cost of printing to some who are able to pay it, but such charges aid in the gratuitous distribution of the same pamphlets among those unable to buy them and no one is ever refused this service, we are advised, because of lack of means to pay the small charge made therefor. The corporation has no stockholders and no one can make a financial profit out of its work.

It follows from what we have said above that the proposed use of the premises at 18-20-22 East Division street by the American Hospital Association in the manner herein set forth is not, in our opinion, in violation of the terms of the Zoning Ordinance, but is in compliance not only with the spirit of the ordinance but also within its express terms.

Very truly yours,

WILLIAM L. SULLIVAN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Cost of Paving Alley Forming Part of Franklin-Orleans Bridge Improvement.

April 10, 1926.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

Your letter of the 7th inst., requesting this office for an opinion as to the liability of the City for a claim made against it by the Chicago and North Western Railway Company for the cost of paving an alley outlet to Kinzie street immediately west of Orleans street, is received.

In your letter you call attention to an opinion heretofore furnished by this office on March 8, 1921, wherein it was stated that the claim of the railway company was unfounded and should not be paid. We note that your office is disposed to question the soundness of the opinion for the reason that it is therein stated that the railway company paved the alley without notice or request by the City, whereas the fact is that the City had knowledge of the situation, and that a previous Commissioner of Public Works approved and granted the request of the company permitting the company to do the actual work.

We concur in the conclusion reached in the opinion referred to, but consider that it is immaterial whether or not the City had any notice of the company's intention to do the work or whether any demand had been made upon the City to do the work. The indemnity clause in Section 21 of the Franklin-Orleans improvement ordinance of March 25, 1916, provides that

“The Chicago and North Western Railway Company will save the City of Chicago harmless from any expense whatsoever on account of the construction of the north approach at Orleans street.”

There does not seem to be any question but what the north approach to the Orleans street viaduct directly necessitated the north-and-south alley outlet to Kinzie street that was provided for in that ordinance. Therefore the amount claimed is an expense "on account of the construction of the north approach at Orleans street."

The fact that by Section 6 of the same ordinance, the City undertook to provide the outlet cannot be reasonably construed to mean that the City likewise undertook to pave and improve it. Under the ordinance the City merely agreed to provide it, and to this extent it has performed what it agreed to do. There might be some doubt as to whether or not under the ordinance the railway company could have been compelled to pave the alley.

It appears from your letter that at the time Commissioner Francis authorized the company to pave the alley, the commissioner was under the impression that the City would be liable for the cost. But it is perfectly clear that the commissioner could not waive the right of indemnity that accrued to the City by virtue of the ordinance, and had the City paved the alley, we believe that it would have been entitled to recover the cost by virtue of this indemnity provision, even though the company might not have been required under the ordinance to do the actual work itself. Yet, inasmuch as it would have been compelled to reimburse the City had the City done the work, the company can not now be heard to complain that it elected to do the work itself.

There seems to be some confusion as to the obligation of the Chicago Union Station Company in connection with this matter. Under Section 21 of the ordinance it appears that the plans for the Franklin-Orleans improvement contemplated the saving of a considerable amount to the station company in the cost of the construction that the company was required to do under its ordinance, and Section 21 of the Franklin-Orleans ordinance provided that the station company "will contribute to the extent thus saved to-

ward the cost and expense of widening Orleans street as herein provided for, including the construction of the north approach to the viaduct, damages, land purchases, including the purchase of land necessary for alley outlet and other expenses."

It was Mr. Pihlfeldt's idea that the City should pay the railway company for the paving of the alley and demand reimbursement from the station company under the quoted provision of the ordinance. For the reasons heretofore assigned, we do not believe the City should pay the claim. However, if your office desires to do what it can to require the station company to pay the bill out of the amount saved to that company by reason of the Franklin-Orleans improvement, we do not know of any serious objection to that procedure. We do feel, however, that we should call to your attention the uncertainty of the language imposing the mentioned obligation on the station company. It will be noted that the station company is required to contribute to the extent of the saving effected toward the cost and expense of widening Orleans street, including the construction of the north approach to the viaduct, damages and land purchases, including the purchase of the land necessary for the alley outlet. It should be observed that the expense, or a portion of it, of widening Orleans street and the purchase of the land necessary for the alley outlet was to be borne by the City, while the cost of the construction of the north approach, together with land damages, were to be borne by the North Western Railway Company. The ordinance makes no reference to any question of priority of access to the amount saved by the station company by either the City or the railway company, or whether the amount so saved should be prorated between the City and the company, or what the basis of such prorating should be.

The last paragraph of Section 21 provides for submission to a board of arbitration of any dispute that may arise between the station company and the City concerning the amount of the contribution of the Union Station Com-

pany as in that section provided for. This provision does not bind the railway company to submit to any arbitration in case of dispute, but seems to consider that the railway company is not entitled to participate in any such contribution—at least it is ignored altogether, although the preceding paragraph of Section 21 provides that the station company will contribute to the cost of the north approach, which latter expense is to be borne by the railway company.

We understand it to be the fact that while a considerable saving resulted to the station company by virtue of the Franklin-Orleans improvement, that no contribution has been made as yet, but that the station company does not question or deny its liability to so contribute. In view of the uncertainty of the language of the ordinance with regard to this question of contribution, we would suggest a conference between your office and the two companies for the purpose of determining what should be the procedure when you finally get to the matter of reimbursement. It may be that further council action will be necessary to reduce this question of contribution to a more definite and understandable basis.

Yours truly,

JAMES J. COUGHLIN,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Fire Pump in Buildings Over Eighty Feet in Height.

April 14, 1926.

MR. JOHN PLANT, Chief Fire Prevention Engineer.

Dear Sir:

This will acknowledge the receipt of your letter of March 31st relative to proposed building to be occupied by

the Peoples Church and the application thereto of Paragraph (b) of Section 1301 of The Chicago Municipal Code of 1922, which provides among other things that in all fireproof buildings constructed of a greater height than 80 feet a fire pump shall be installed.

Your department, you state, determines the height of a building for the purpose of the above ordinance by measuring the distance from the established street grade to the highest point of the roof, and under your interpretation the proposed building is slightly over 80 feet in height.

But according to the interpretation of Condron & Post, designing engineers, the proposed building will be slightly under 80 feet in height. Their contention is that since Section 1301 does not define what is meant by the "height" of a building, the height should be determined as prescribed by other ordinances.

The proposed building is to be fireproof. Paragraph (b) of Section 812 does define the method of computing the height of a fireproof building and is as follows:

"(b) The height of a fireproof building shall be the perpendicular distance from the inside sidewalk grade of the street nearest the building to the highest point of the external bearing walls. Where such street grade varies, the mean or average grade thereof opposite the building shall be the data from which such height is measured."

Section 812 is a part of Article XIII, entitled "General Provisions" of the Building Code, and is applicable to buildings of all classes.

The word "height" is a more or less relative term, and where the ordinances contain a specific definition of such a word, that definition should be followed unless there is express provision excluding such construction or the subject-matter or context is repugnant thereto, which in our opinion is not the case here.

Without going into unnecessary details, therefore, it is our judgment that the height of the proposed building for

the purpose of Section 1301 should very properly be determined according to the provisions of Section 812 of The Chicago Municipal Code of 1922.

Messrs. Condron & Post have submitted the following data in reference to the matter of the interpretation of the height of the proposed building:

	Feet
Elevation of the bottom of the roof trusses of the main lodge hall	80.1
Elevation of the bottom of roof beams for side lodge hall	81.2
Average	80.65
Average grade	.9
Average distance from grade to the bottom of roof construction	79.75

These figures, however, are a matter for engineers rather than for this department, and we respectfully submit them to you.

Very truly yours,

WILLIAM L. SULLIVAN,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Validity of Patent on Bridge Barriers.

April 15, 1926.

MR. FRANCIS X. BUSCH, Corporation Counsel.

Dear Mr. Busch:

Re: Strauss Patent No. 1,332,237, granted March 2, 1920.

With reference to the above, we beg to advise that we have now received the file wrapper and contents of the above

application, including the references cited during the prosecution of the application for this patent. We have considered this file wrapper and these references.

We have also conferred with Mr. Pihlfeldt and Mr. Avery of the City Bridge Engineering Department, and with Mr. E. D. Sawyer, the inventor of the barrier you propose to use at Lake street.

We have also conferred with Mr. Joshua R. H. Potts, who is handling the patent applications for Mr. Sawyer, relating to the barrier which is here involved.

We suggested to Mr. Avery and Mr. Pihlfeldt that they make certain changes in the Lake street barrier, with a view of getting further away from the claims of the Strauss patent, and we are handing you with this letter a copy of the blueprint which has been supplied to us, which shows the construction of the barrier as the City now proposes to use it, this blueprint being made from drawing 10,342, and having been corrected as shown in the drawing. The correction relates to the cam constituting a part of the brake mechanism. In a letter of April 9th to us, sending over this corrected drawing, Mr. Pihlfeldt says:

“The drawing as now corrected will ensure constant and uniform application of the brake at practically the start of any drawing out of the net caused by striking it with a machine.”

THE STRAUSS PATENT.

The application for this patent was filed August 25, 1919, Serial No. 319,655, Device for Stopping High-Power Vehicles. In the Office Action of November 1, 1919, a number of the claims were rejected, this Office Action containing the following paragraph:

“The Examiner has given the case careful consideration and is of the opinion that the inventive idea disclosed can be expressed by stating that the barrier or impact receiving device has a primary mechanism at each end permitting quick retarding movement of said barrier, and a secondary mechanism at each end

acting later, in conjunction with the primary mechanism, to slacken and stop said retarding movement.

Apparently the Patent Office Examiner deemed this feature, that of having a primary and a secondary retarding mechanism, to be the most important feature of the alleged Strauss invention, and this is borne out by the fact that more of the eighteen claims relate to this feature than to any other. As appears from the quotation above from Mr. Pihlfeldt's letter, and from the blueprint submitted herewith, this feature is wholly lacking in the Lake street barrier.

Claim 4 of the patent is limited to the idea of having a barrier having a yielding part extending across the roadway space to be protected, and an unyielding part across the footwalk and means for simultaneously moving the yielding and unyielding parts into their operative positions; this must be interpreted to mean a single mechanism or means for simultaneously moving both parts of this barrier. This feature is wholly absent, we are advised, in the Lake street barrier, our understanding being that the footwalk and road barriers are operated by separate motors, and not simultaneously.

A number of the claims are limited to the feature of having a flexible device (the cable) connected to the end of the barrier and extending axially along the interior of the support or post, meaning that this flexible device extends from the bottom of the post up to the top, on the inside of the post, so that, as the barrier is pulled out, the retarding weight is pulled up inside of the post. This feature is also wholly absent in the Lake street barrier.

A fourth alleged element of novelty is that of using a weight as a retarding means; see claims 8, 9 and 10 of the patent. The City does not use a weight.

A fifth alleged element of novelty lies in having removable guides on the posts on which the spacers operate, as set forth in claim 15. We understand that the proposed guides on the posts of the Lake street barrier will not be removable.

A sixth alleged element of novelty lies in having separate motors for each support, as in claim 16 of the patent. We understand that in the Lake street barrier, it is proposed to use one motor only.

A seventh alleged element of novelty is found in claim 17, in that the friction device is "located near the top of the support." Our friction device which is in the form of a drum in the Lake street barrier, is near the bottom of the support.

THE CLAIMS INVOLVED.

As no suit has been brought upon the patent, and as the attorneys for Mr. Strauss have not pointed out the claims they charge to be infringed, we must assume that if suit were brought at all, it would be brought upon all of the claims. The eighteen claims of the patent might be classified in the following groups:

1.

Claims 1, 2, 5, 6, 7, 11, 12, 13 and 14 relate to the feature of having a primary and a secondary retarding mechanism.

It seems clear from the explanation given to us by Messrs. Pihlfeldt, Avery and Sawyer, as well as from Mr. Pihlfeldt's letter of April 9th, and the blueprint submitted herewith, that the Lake street barrier is so designed as to insure the constant and uniform application of the brake from the time the net is struck by an automobile; in other words, in our alleged infringing construction, this alleged novel element, apparently deemed to be the most vital element of the patent, is wholly absent in our construction, as we do not have a primary and a secondary retarding mechanism.

2.

Claim 4 relates to the feature of having an unyielding barrier across the footwalk and a yielding part extending

across the roadway space, and means for simultaneously moving the yielding and unyielding parts into their operative positions.

As already stated, we are informed this feature is not found in the Lake street barrier.

3 .

Claims 3 and 18 relate to the feature of having a flexible device extending axially along the interior of the spacers or posts.

This feature is likewise wholly absent in the Lake street construction.

4 .

Claims 8, 9 and 10 of the patent relate to the feature of using a retarding weight.

The Lake street barrier uses no weight as a retarding mechanism.

5 .

Claim 15 of the patent relates to the feature of having removable guides connected with the supports or posts.

We understand the guides to be used in the Lake street barrier will not be removable.

6 .

Claim 16 specifies that separate motors are to be used with each support.

In the proposed Lake street barrier, one motor only is to be used to operate the barrier.

7 .

Claim 17 specifies that a friction device located near the top of the support or post of the mechanism is to be used.

In the Lake street barrier device, the friction device is located at the bottom of the post or support.

THERE IS NO INFRINGEMENT.

It is quite apparent from what has been said above, that if it be sought to read each of the claims of this patent upon the Lake street barrier, certain of the elements claimed will be found lacking. In other words, the proposed Lake street barrier does not have all of the elements of any one claim of the patent, so that, as far as the claims of this patent are concerned, you would seem to be safe in proceeding with the manufacture and use of the Lake street barrier.

Nor do we think these claims are of the type which the court would broaden by applying the doctrine of mechanical equivalents. The very nature of the alleged invention requires that the claims shall be specific, and courts are not inclined to materially enlarge such specific claims as this patentee was compelled by the state of the art to make.

PRIOR USES.

Mr. Avery and Mr. Sawyer say that barriers of the general type described and claimed in the Strauss patent were in public use more than two years prior to August 25, 1919, the date of the filing of the Strauss application. We are also informed that detailed drawings of such barriers are in existence, and that copies thereof can be obtained.

We advise that copies of these drawings be obtained, and that the names and addresses of witnesses who are familiar with the facts shall be now obtained, in order that these prior uses can be proven, should suit be brought against the City on this patent, and should it then be found advisable to prove any prior uses.

STRAUSS-SAWYER INTERFERENCE.

We are informed by Mr. Potts, the patent attorney for Mr. Sawyer, that one of the pending applications of Mr.

Strauss is involved in an interference with a pending application of Mr. Sawyer, relating to the type of device which it is proposed to use at Lake street, though we are not informed as to the claims which were involved in this interference.

The Examiner of Interferences decided in favor of Mr. Sawyer, holding that he was entitled to priority with reference to the claims involved in the interference. On appeal to the Board of Examiners in Chief, the Examiner of Interferences was reversed, and the decision of the Board of Examiners in Chief was affirmed by a decision of the Assistant Commissioner of Patents, on appeal. Mr. Sawyer thereupon appealed to the Court of Appeals of the District of Columbia, where the matter is now pending. We should say the probability is that the decision of the Board of Appeals and of the Commissioner of Patents will be affirmed by the Court of Appeals, in which event the Patent Office will be directed to enter a judgment of priority in favor of Mr. Strauss and against Mr. Sawyer.

We have made no investigation as to the claims of the Strauss application involved in this Strauss-Sawyer interference. But we are calling it to your attention, for the reason that, should Strauss win in this interference, whatever claims he has in his application which are involved in the interference, may become of importance to the City, should it continue to build barriers like the proposed Lake street barrier, after a patent issues upon the Strauss application involved in the interference, should Strauss finally win. Even should Mr. Strauss win in the interference, his new patent could only be invoked from the time of its date, but it might be well for you, before installing many of the Sawyer barriers, to consider this pending Strauss patent application. Doubtless a decision will be had shortly in the Court of Appeals, so that perhaps you may as well defer such consideration until that decision has been handed down. Should this patent issue to *Strauss*, he might sue to prevent your *use* of the Sawyer barrier.

THE SAWYER INVENTION.

As you know, Mr. Sawyer expects to obtain patent protection upon the type of barrier which you propose to instal and use at the Lake street bridge. We are advised that, as far as this particular barrier is concerned, Mr. Sawyer expects no compensation from the City by way of a royalty or license fee.

Doubtless Mr. Pihlfeldt and Mr. Avery have a general understanding with Mr. Sawyer as to what shall be done should the City decide to instal other barriers of this same general type.

We are merely calling it to your attention, in order that the City shall not engage in the use of barriers of this type on a large scale, without having some definite understanding with Mr. Sawyer as to what, if anything, shall be paid to him for the use of his inventions, should he finally be able to obtain patent protection.

We are handing you herewith a copy of the Strauss patent No. 1,332,237, so that you may have it before you when you consider this opinion. We are sending this opinion to you in triplicate, thinking you may wish to send a copy to Col. Sprague and to Mr. Pihlfeldt.

Respectfully submitted,

DYRENFORTH, LEE, CHRITTON & WILES,
By GEORGE A. CHRITTON.

APPENDIX.

(The opinions which follow were written prior to April 16, 1925, but were not published in former volumes. It has been found necessary to refer to them frequently, and therefore we deem it advisable to print them so as to make them more readily accessible.)

Rights of Chicago, Milwaukee & St. Paul Railway Co. in Bloomingdale Road.

Chicago, May, 23, 1906.

HON. JOS. F. KOHOUT, Chairman, Committee on Track Elevation.

Dear Sir:

In response to your request for information concerning the rights of the Chicago, Milwaukee & St. Paul Railway Company in Bloomingdale road, I beg leave to submit the following:

The City Council on June 12, 1872, by ordinance, granted to the Chicago & Pacific Railroad Company the right to construct and maintain a single or double track on Bloomingdale road from the western limits of the City to and across Coventry street. Western avenue was at that time the western boundary line of the City. This was an indeterminate grant. The ordinance was twice amended, but the amendments did not affect the company's rights in Bloomingdale road.

The Chicago, Milwaukee & St. Paul Railway Company leased these tracks from the Chicago & Pacific Railroad Company up to June 30, 1898, when a deed was made by the last

named company by which the Chicago, Milwaukee & St. Paul Railway Company succeeded to its rights in this street.

It will be seen from the above that so far as the portion of Bloomingdale road between Coventry street and Western avenue is concerned, if the company has observed the terms and conditions of the ordinance, its rights cannot be questioned.

The only other grant to this company on the street in question made by the City Council, aside from track elevation ordinances and ordinances for private switches, was made by an ordinance passed July 29, 1889, by which the company was given authority to "extend and operate their switch track now in Bloomingdale road from a point about fifty feet west of the west line of Maplewood avenue, along said Bloomingdale road to a point near the east line of Rockwell street." This grant was for 10 years only, has since expired, and relates to only a very small portion of the street. It is of interest, however, on account of the peculiar wording of the grant. It seems to indicate that the council was reluctant about conceding the rights asserted by the company, and does not harmonize at all with the broad claims it makes concerning the street in question. It concerns a part of the street which was outside of the City limits at the time the first ordinance (June 12, 1872,) was passed. I should judge, from the ordinance itself, that the council, in passing it, had an eye to the fact that the rights claimed by the company in the street had been fiercely assailed and were regarded as doubtful, since, so far as I can see, if the rights claimed by this company under the ordinance of the Village of Jefferson hereafter mentioned actually existed, there was no need of any ordinance extending its track in Bloomingdale road—at least not under the construction placed on such ordinances until very recently. Up to the time the Supreme Court rendered the decision in *Ch. Term. Tr. Ry. Co. v. Chicago*, 220 Ill. 310, the railroad companies all maintained that an ordinance granting them the right to lay down "one or more railroad tracks, with all such

switches, etc., as may be necessary," gave them the right to construct additional tracks and switches at any time in the future.

The mere fact that the council passed the switch track ordinance mentioned above would seem to indicate, therefore, that there was doubt concerning this right of way.

The company bases its claim in Bloomingdale road west of Western avenue on an ordinance which was before the Board of Trustees of the Village of Jefferson on February 23, 1884. It is contended by the company that the ordinance was duly passed and accepted, although it is admitted that the record does not show it.

Whether or not the ordinance was actually passed is a disputed question of fact. In my judgment, however, the facts clearly indicate that the ordinance did not pass. The record does not show a ye and nay vote, the ordinance was not signed by the president of the board, and the village attorney, writing to the company on February 25th, two days afterwards, states that "The ordinance for your right of way was reconsidered, * * *," but fails to state that same has passed. These omissions would be significant on a matter of such importance at any time, but they become still more significant in the light of other entries on the village records which I mention below, and which seem to show that this particular grant was a much mooted question both before and after the date in question.

Whether or not the failure of the village clerk to keep a record of the passage of this ordinance (if it was in fact passed) would be fatal to the ordinance is a question of law that has not been settled. In Pennsylvania it has been held that if there is no record the valid acts of a municipal legislative body can be established *dehors* the record.

Barton v. City of Pittsburgh, 4 Brewst. 377 (Pa.).

Avoca v. Pittston, 7 Kulp. 470 (Pa.).

Erie Academy v. Erie, 31 Pa. 515.

On the other hand, the courts of Michigan and Missouri have held that the record must show the passage of an ordinance where the statute directs such a procedure.

Rumsey v. Schell City, 21 Mo. App. 175.

Moser v. White, 29 Mich. 59.

Our own courts lean toward the doctrine that such exercise of power by a municipality must be made a matter of record.

McDonald v. Pres. & Tr. of Vill. of Lockport, 28 Ill. App. 157.

Schofield v. Vill. Tampico, 98 Ill. App. 324.

“A municipal corporation is the mere creature of law and derives its powers from the act creating it. It is incapable of exercising its powers in any manner not authorized by such act.”

Burke v. San. Dist., 92 Ill. App. 333.

The yeas and nays must be taken upon the passage of all ordinances.

Knight v. Vill. of Thompsonville, 74 Ill. App. 550.

Hackman v. Vill. of Staunton, 42 Ill. App. 409.

The provision that such yea and nay vote shall be entered on the journal has, however, been held merely directory.

Vill. of Belknap v. Miller, 52 Ill. App. 617.

Numerous decisions in this State hold that such a record may be amended. There is no doubt that the power to amend is complete while the officials remain in office. In the present case, however, not only have the trustees and the village clerk ceased to hold their positions, but the municipality itself has passed out of existence. Under such circumstances the record cannot be amended, and I am of the opinion that our courts would hold as to the passage of the ordinance that this cannot be established by evidence outside of the record, and that the company would have to fall back on the question of estoppel in its efforts to maintain its contention.

The records of the Village of Jefferson indicate that the railroad was in this street long before February 23, 1884. In the minutes of the Village Board for May 29, 1876, we find the following entry :

“The Clerk was ordered to notify the Chicago & Pacific Railroad to put Bloomingdale Road in good repair and remove obstructions.”

Again, in the minutes of September 9, 1882, the following appears :

“On motion of Trustee Budlong the attorney was instructed to cause the Chicago, Milwaukee and St. Paul Railroad Company to show cause why they are occupying Bloomingdale Road.”

From the above it is quite clear that the company was occupying the street in question although there does not appear to be any ordinance authorizing such use. I am informed that there were switch tracks run along the street at different points from time to time, and that these were afterwards connected and made continuous tracks.

On November 24, 1893, the minutes show the following :

“A special committee was appointed consisting of Trustees Budlong, Hanssen, McCormick and the attorney, to confer with the Chicago, Milwaukee and St. Paul Railway Company, with a view to the passage of some ordinance granting permit to occupy, and containing provisions for the same, of Bloomingdale Avenue.”

The above committee may have been the one which drafted the ordinance in dispute. The only thing that appears on the record concerning this ordinance on February 23, 1884, when the ordinance is said to have passed, is the following :

“Under the head of unfinished business the Attorney reported on the matter of an ordinance regulating the Rail Road's occupancy of Bloomingdale Street—that the company had not accepted the ordinance as submitted to them—objecting to the clause requiring parts of the street to be planked, etc.

On motion of Trustee McCormick, this clause in the ordinance was ordered stricken out, except so far as relates to crossings of streets, and the attorney directed to re-submit the ordinances for the Railway Co.'s acceptance."

In pursuance of the above the village attorney sent the following communication.

Chicago, February 25th, 1884.

E. Walker, Esq.,
Gen. Sol. C. M. & St. P. Ry. Co.,
Dear Sir:—

At the meeting of the Trustees of Jefferson on last Saturday, the ordinance for your right of way was reconsidered, and the clause requiring the planking between the rails on Bloomington Street was expunged, but no alteration was made in the clauses requiring your Company to keep the roadway of the Street in passable condition and to take care of the ditches on each side of your railroad. I am inclined to the opinion that under the Statute it appears to be your duty to take care of the drainage anyway, and as to the keeping the street in order, that provision looks much more formidable than it in reality will prove.

I trust you may see this matter in the same light that I view it in, and close it, as I begin to wish for the end.

Respectfully yours,
Francis Deifuhl,
Attorney for Village of Jefferson.

After the supposed passage of the ordinance in question we find many entries in the record which show plainly that another ordinance granting rights to this company in Bloomingdale road was introduced in the Village Board, but I have been unable to find the ordinance or any record of its passage. Neither have I been able to find a record of the acceptance of the ordinances of February 23, 1884, unless the excerpt taken from the records of November 15, 1886 (see below), relates to this acceptance.

As indicating that there was another ordinance under consideration, I submit the following extracts from the records, which are only a part of what appears there in relation

to Bloomingdale road so far as it affects the point in question:

Under date of October 9, 1886.

“A plat showing a sidetrack desired to be placed on Bloomingdale Road with consent of owners of land adjoining was ordered returned to parties presenting same.”

Under date of October 16, 1886:

“A motion to reconsider the vote taken on the adoption of the Rail Road ordinance was carried.”

The last may refer to another ordinance passed about that time, but it seems to me, from the investigation I made, to refer to the C. M. & St. P. ordinance then under consideration.

We also find the following in the minutes of the meetings of the board under the dates named below:

November 15, 1886—

“The attorney made report on matter referred on applications for new track to be laid on Bloomingdale Road, recommending that permit be not granted until the C. M. & St. P. Railroad Company enter into an agreement with the Village providing for drainage, and so on; also that the railroad company be required to pay their proportionate share of the expense of keeping said street in repair. Report adopted and attorney instructed to notify the company of the action of the Board.
* * *

“A remonstrance was received against the passage of the C. M. & St. P. Railroad ordinance, together with an acceptance from the C. M. & St. P. Railroad Company, and the whole matters referred to the attorney.”

November 16, 1886—

“Trustee Kimbell moved that the attorney be instructed to communicate with the C. M. & St. P. Railroad Company, and inquire by what authority said company occupied the street known as Bloomingdale Road. Carried.”

January 8, 1887—

“The engineer was instructed to notify the Chicago, Mil. and St. Paul Rway Co. to remove the telegraph poles obstructing the sidewalk on Bloomingdale road.”

February 16, 1887—

“Trustee Munch inquired of the engineer what steps had been taken with reference to the removal of the telegraph poles from the sidewalk on Bloomingdale road.

“The engineer stated in answer that the R. R. Co. had promised to remove the poles in question as soon as the frost was out of the ground.”

The last three excerpts quoted are also of interest in connection with the question of whether Bloomingdale road was a public highway, which forms a part of the controversy.

The question naturally suggests itself why should a new ordinance be asked if the one claimed under had been duly passed? Also, why should the record not have been amended when it was discovered, as it must have been, that it failed to show the passage of the ordinance?

Aside from any question as to whether such an indeterminate grant of this character can bind the City of Chicago after the municipality which granted it has ceased to exist (a question which has been raised by the recent telephone and street car decisions), it is a matter of serious doubt whether the railroad company has any ground for claiming any rights in this street beyond Western avenue under the ordinance of February 23, 1884.

I am informed that while the village clerk is dead, some of the trustees whose names appear in the record are still alive, and if it becomes necessary to do so, this matter can be more thoroughly sifted.

Coming now to the question of estoppel, we find that the City Council has passed three track elevation ordinances relating to this street. The first was passed on December 29, 1897, and relates only to that portion of the street which is not in dispute. The second was passed on February 21, 1898, and provided for elevation between Lawndale avenue

and Fortieth avenue. The last was passed on January 13, 1902, and provided for elevation west of Fortieth avenue.

Assuming that the company had no rights in this street prior to the passage of the last two ordinances, or that such rights had lapsed, the legal effect of these track elevation ordinances is the same as if a new grant had been enacted. Hence, there can be no question as to the right of the company in the street from Lawndale avenue west. The only question in this connection is whether the street is a public highway, a question which may have some bearing on the matters which your committee is considering.

According to the plats on file in the Department of Track Elevation, the company claims to own its right of way in fee simple from Keeney avenue to Crawford avenue, also from Springfield avenue to Kedzie avenue. It also claims to own more or less property in fee simple on its right of way from Crawford avenue to Springfield avenue, from Kedzie avenue to Mitchell street, and from Western avenue to Robey street.

I assume that your committee does not desire that I should go into the question of the title of the railroad company to the property which it claims, but simply to state my opinion as to the probable effect of a move looking to the elevation of the tracks from Ashland avenue to Lawndale avenue.

About six months after the passage of the track elevation ordinance of January 13, 1902, one Charles H. Beers applied for an injunction to prevent track elevation under said ordinance, on the ground that Bloomingdale road was a public highway and that the filling in of this street would injure the adjoining property of the complainant, would destroy the street for public use, etc. It seems that under the former track elevation ordinance the street had been affected near Beers' property by the descending grade, also that there had been some work done under the new ordinance at the time the bill for injunction was filed.

The court refused to grant Beers any relief on the ground of laches, holding that Beers had slept on his rights

in waiting so long before he went into court. (*Beers v. C. M. & St. P. Ry. Co.*, 141 Fed. 957.) The court, however, did not pass on the question whether the street was a public highway or not, nor did it indicate whether it would have held that the complainant was entitled to relief if he had applied in time.

I should judge from this proceeding and from the proofs submitted upon the trial of the case that in the event of a new track elevation ordinance being passed, litigation would undoubtedly result, and there is at least a strong probability that an injunction would be granted unless provision is made for a new street or at least for leaving open a part of Bloomingdale road for public travel.

While the law with regard to the elevation of tracks in a public street is still somewhat unsettled, it can be said that in case enough of the street filled in is left for public use to enable the accommodation of traffic, it cannot be regarded as a complete abandonment, and the reversionary rights of the dedicator or of adjoining owners do not attach except in case of a complete abandonment.

In view of all the details which I have presented, it would appear to me that in case a new track elevation ordinance is framed, it ought to contain provision for leaving enough of Bloomingdale road for a street alongside the elevated tracks, and that if such street is not wide enough for purposes of public travel the railroad company can be required to provide for this either by purchase or condemnation of a strip alongside its right of way.

I find nothing except what is mentioned above that would enable the railroad company to invoke the doctrine of estoppel.

Yours respectfully,

LEON HORNSTEIN,

Approved:

Assistant Corporation Counsel.

MACLAY HOYNE,

Assistant Corporation Counsel.

Right of City to Compel Abutting Owners to Clean Snow and Ice from Sidewalks.

January 7, 1915.

TO THE HONORABLE, THE CITY COUNCIL OF THE CITY OF CHICAGO.

Gentlemen:

On December 28, 1914, the following resolution was passed by your Honorable Body:

“Resolved, That the Corporation Counsel be and he is hereby directed to render an opinion to the City Council as to the city’s powers to require owners or occupants of buildings or vacant lots adjoining any streets to keep the walks clean of snow or ice, or make them otherwise safe for pedestrians, and in the event that such power is lacking, to suggest the necessary state legislation.”

In response to the order contained in the above resolution we submit a list of authorities showing what the attitude of our courts is on the question propounded. The doctrine announced in these cases has been so often re-affirmed by them that it would seem as though they are so far committed to it as to preclude the enactment of any law which can be enforced against abutting property owners generally to do away with this evil. Since it conflicts with some opinions rendered by other eminent tribunals, however, we undertake to point out a way in which the question in a somewhat modified form may be again raised with the possibility of a more favorable result.

The principle that a public burden cannot be imposed on a private individual, on which our Supreme Court relies in holding that a municipality cannot compel a lot owner to keep snow and ice from the sidewalk, was laid down in a number of decisions involving the same general subject-matter in some very early cases, but it was not until 1878 that the precise question was decided, in *Gridley v. City of Bloom-*

ington, 88 Ill. 554. In that case, the court passed on the question presented by the resolution, and it has consistently adhered to its position from that time to this. We quote the following from the decision:

“The public had an easement over the street in front of the lot occupied and owned by defendant, and it makes no difference, so far as this decision is concerned, whether the fee of the street passed by the plat and dedication to the corporation, or whether it remained in the original proprietor. It is plain defendant has no other interest in the street in front of his property than any other citizen of the municipality. The same is true of the sidewalk. It is a part of the street set apart for the exclusive use of persons traveling on foot, and is as much under the control of the municipal government as the street itself. The owner of the adjacent lot is under no more obligation to keep the sidewalk free from obstructions, than he is the street in front of his premises. He may not himself obstruct either so as to impede travel on foot or in carriages. It will be conceded the citizen is not bound to keep the street in front of his premises free from snow or anything else that might impede travel; then, upon what principle can he be fined for not removing snow or other obstruction from the sidewalk in which he has no interest other than what he has in common with all other persons resident in the city. * * * It was expressly decided by this court, in *City of Ottawa v. Spencer*, 40 Ill. 211, that local improvements of either sidewalks or streets can not be compelled under the general police power. The legislature must afford the necessary power for constructing all needful improvements, subject to constitutional limitations; and when one mode of making such improvements is sanctioned by the constitution, no other can be adopted.

“Keeping streets and sidewalks in repair, and free from obstructions that impede travel or render it dangerous, is referable to the same power as for constructing new improvements. The sidewalk, as was declared in the case cited, is as much a public highway, free to the use of all, as the street itself, and, upon principle, it follows, the citizen can not be laid under obligations, under our laws, to keep it free from obstructions in front of his property at his own expense, any more than

the street itself, either by the exercise of the police power or by fines and penalties imposed by ordinance, or by direct legislative action."

Gridley v. City of Bloomington, 88 Ill. 554.

In the case of *City of Chicago v. O'Brien*, 111 Ill. 532, it was contended that the *Bloomington* decision was based on incorrect grounds, and counsel for the City undertook to show that the ordinance of the City of Chicago which was before the court was a proper police regulation. But the court reaffirmed the above decision, and among other things, said, on page 536:

"Even the police power, comprehensive as it is, has some limitations. It can not be held to sanction the taking of private property for public use without making just compensation therefor, however essential this might be, for the time, to the public health, safety, etc. And upon like principle, a purely public burden can not be laid upon a private individual, except as authorized in cases to exercise the right of eminent domain, or by virtue of proper proceedings to enforce special assessments or special taxation. * * * Undoubtedly, the allowing of ice and snow to remain upon a sidewalk may be declared a nuisance, but it must be a public nuisance, and one, too, not caused by the act of the adjacent property holder, but solely by the action of the elements. No one questions the right of the municipality to prevent such use of property and such action of the citizen as may be injurious to the public; but the adjacent lot owner has no ownership or control of the adjacent street, and this ordinance seeks to control the action of no one while on the street. The lot owner is held responsible solely and simply for the accident of owning property near the nuisance. He may have no more actual control of the street, or necessity to use it, than if his property were miles away; still, he is held responsible for a result he could not control, and to the production of which he did not even theoretically contribute. The gist of the whole argument is merely that it is convenient to hold him responsible. It is not perceived why it would not be equally convenient to hold him responsible for the entire police government of so much of the street."

City of Chicago v. O'Brien, 111 Ill. 532.

In the same volume appears the case of *City of Chicago v. Crosby* (111 Ill. 538), expressly reaffirming the doctrine laid down in the above cases.

It has been suggested that the above cases are not recent ones, and that perhaps the views of the court have been modified by later developments and a more modern trend of thought. But there is no foundation for this idea.

In *City of Chicago v. Union Traction Co.*, 199 Ill. 259, the court speaks approvingly of both of the decisions from which we have taken excerpts, quotes from them, and adds, on page 266, the following:

“The doctrine of these cases is unquestionably sound. * * * The owner of property abutting on a street has no interest in the street of the city, as a street, other than that possessed by every other citizen. He may be required, by way of special assessments or special taxation laid in pursuance of law, to make special contributions to defray the cost of constructing a sidewalk or improving the street, but this is upon the theory the value of his property is enhanced thereby. The burden, however, of keeping the sidewalk or street clear of snow, ice and other accumulations is a public burden, and no obligation is imposed upon the lot owner to perform that which it is the duty of the municipality, as the representative of the public, to perform. The lot owner has no special right, benefit or interest in the street in front of his premises. * * *”

City of Chicago v. Union Traction Co., 199 Ill. 259.

It will be noted that in all of these cases the court bases its rulings on the constitutional rights of the abutting owners and not on any question of delegation of power or the proper mode of the exercise of a power. It holds in each instance that the police power of the State does not include the power to compel abutting owners to remove snow and ice placed upon the public thoroughfares by natural causes.

The general doctrine laid down in the above cases, as applied to similar questions, was passed on in the same manner in *City of Chicago v. McDonald*, 111 Ill. App. 436, in *Farson v. Fogg*, 205 Ill. 326, and in the very late case of *Koy v. City of Chicago*, 263 Ill. 122, decided in April, 1914.

In the case last mentioned, where the court upheld the City's power to regulate the sale of milk, it distinguished the line of cases that we have presented from the one under consideration, saying that in *Gridley v. Bloomington* and *Chicago v. O'Brien*, "It was held that the burden of keeping sidewalks free from obstructions by snow could not be laid upon the private owners of adjoining property," but that in the case before it the principle had no application because the sale of milk was a business directly concerning the public health which the City had the right to regulate.

We could cite a number of decisions besides the above, but feel that we have sufficiently demonstrated that the law is clear in this State that the municipality has no power to pass a general ordinance of the kind proposed and that the police power of the State cannot be invoked for this purpose. The Legislature is as powerless as the City Council in this respect.

On the other hand, as stated above, there is abundant authority in other jurisdictions directly in conflict with these decisions.

Dillon, in his work on *Municipal Corporations* (5th Ed., Sec. 713), expresses a contrary view in the following language:

"Under a general power to make 'needful and salutary by-laws,' a city ordinance of Boston, requiring the tenant or occupant, or, in case there shall be no tenant, the owners of buildings bordering on *certain streets, to clear the snow from the sidewalks adjoining their respective buildings*, is reasonable and valid. It was objected against this ordinance that it violated the fundamental maxim that all burdens and taxes laid upon the people for the public good shall be equal. The objection was overruled. And it was justly regarded by the court as in the nature of a police regulation, requiring a duty to be performed highly salutary and advantageous to the citizens of a populous and closely built city, and imposed upon the persons named because they are so situated that they can promptly and conveniently perform it; and it is laid not upon a few, but upon a

numerous class, and equally upon all who are within the description composing the class and who commonly derive a peculiar benefit from the duty required. It would doubtless be otherwise if the ordinance arbitrarily imposed this duty upon the mechanics or merchants, or any other class of citizens between whose convenience and the labor required there is no natural relation."

In support of the above text the following Massachusetts cases are cited:

In re Goddard, 16 Pick. 504,

Union Railway Co. v. Cambridge, 11 Allen 287,

Kirby v. Boylston Market Ass'n, 14 Gray 249.

In the state of New York similar ordinances have been upheld. In one case the Illinois doctrine is expressly refuted. We quote at length from same in order to show the theory on which it is based.

"If this power of local legislation can be conferred upon the largest city in the State, it can also be conferred upon the smallest village that the legislature sees fit to incorporate. In this latitude the accumulation of snow upon sidewalks in large quantities is a matter of course. Its presence retards travel, interrupts business and interferes with the safety and convenience of all classes. It is a frequent cause of accidents and thus affects the property of every person who is liable to assessment to pay the damages caused by a failure to remove it. But how is it possible for the authorities of a large city with many hundred miles of streets, to remove the snow in time to prevent injury to those who have the right to travel upon the sidewalks unless they can require the owners and occupants of adjacent property to remove it? Every man can conveniently and promptly attend to that which is in front of his own door, and it is both reasonable and necessary that he should be compelled to do so. We think that the ordinance under consideration is valid; that it conflicts with no provision of the Constitution, and that it is the duty of the courts to enforce it.

"In reaching this conclusion, we have not overlooked the case of *Gridley v. Bloomington*, 88 Ill. 554; 30 Am. Rep. 566, but have given it the attention to

which it is entitled by the high standing of the court that decided it. The argument upon which the opinion in that case rests is that as the fee of the street was in the corporation and the sidewalk was a part of the street, the lot owner had no more interest in the sidewalk in front of his premises than any other citizen of the municipality, because it was set apart for the exclusive use of persons traveling on foot and was as much under the control of the municipal government as the street itself.

“We are unable to yield to this reasoning, because it overlooks not only the public safety and general convenience, but also the peculiar interest that every owner or occupant of real property has in a clean sidewalk in front of his own premises. Whatever adds to the usefulness of a sidewalk adds both to the rental and permanent value of the adjacent lot.”

Village of Carthage v. Frederick, 122 N. Y. 268.

To the same effect are *People v. Mattimore*, 45 Hun (N. Y.), 448, and *Taylor v. Yonkers*, 105 N. Y. 202.

The Supreme Court of Nebraska, in *City of Lincoln v. Janesch*, 63 Neb. 707, upheld the right of the City to impose such an obligation on property owners, cites numerous authorities for and against the validity of the clause of the charter conferring the power, and says:

“Our conclusion * * * is that the provision of the Lincoln charter above set out was enacted for the convenience and safety of the public and is unaffected by constitutional limitations upon the power of taxation.”

This diversity of opinion in different jurisdictions explains why ordinances of this kind are enacted and enforced in some cities while not in others.

In regard to suggesting state legislation, we call your attention to the fourteenth clause in the section delegating powers to the City, which authorizes it “to require the owner or occupant of any premises to keep the sidewalks in front of, or along the same, free from snow and other obstructions.” It will therefore be seen that, if it were not for the adverse

decisions we have quoted from, the City's power would be ample.

Some slight relief might be afforded by an ordinance or a series of ordinances which would have for their object the regulation of sidewalks so as to keep them free from snow and ice where abutting owners make use of a portion of same or of the space above or underneath them. But such ordinances at best would be but skirting around the outer edges of the evil which you are seeking to control.

The only recommendation we can offer, under the circumstances, is to suggest that an effort be made to secure the passage of an act of the Legislature which will provide for the cleaning of snow and ice from a path of limited width over walks that have been improved with permanent sidewalks in cities or villages of more than 60,000 population. Such an act would differ from the provision in the Cities and Villages Act in that it limits the matter to walks where the traffic is great.

While it may be said that the principle involved is substantially the same whether an abutting owner or occupant has to clean the whole walk or only a path, it may be that the court would not regard it so much in the light of a public burden where the individual is not required to sweep or clean the whole sidewalk but is only compelled to render passage before his own premises safe in a place where there is a peculiar advantage to the property in question. It is possible that a court may be persuaded to yield such a concession to the public convenience without receding from the general constitutional principle that has been the obstacle to such legislation in the past.

Yours respectfully,

LEON HORNSTEIN,

Assistant Corporation Counsel.

Approved:

WILLIAM H. SEXTON,

Corporation Counsel.

Report on Formulation of Traction Plans.

February 1, 1922.

HON. ULYSSES S. SCHWARTZ, Chairman of the Committee on
Local Transportation.

Dear Sir:

January 27, 1922, you requested our opinion as to whether a traction plan can be formulated without additional legislation, and also asked for the general outline of such a plan. We have given the matter such attention as time permitted and now submit the following as our conclusions.

We understand there are now four traction plans pending before your honorable committee. We will discuss these propositions in the order in which they were presented. We shall not attempt to discuss all of the merits or demerits of the various propositions but confine ourselves solely to your inquiry.

These plans are as follows:

First. The September, 1918, traction ordinance passed by the City Council but rejected on referendum vote by the people;

Second. Mayor Thompson's Traction District Plan submitted to the City Council September 9, 1919;

Third. The plan submitted by you to the sub-committee of the Local Transportation Committee under date of December 19, 1921; and

Fourth. The plan submitted to your committee January 12, 1922, by Mr. Henry A. Blair, president of the Chicago Surface Lines.

First. The September, 1918, traction ordinance indicates by express terms that enabling legislation was necessary before the ordinance could go into effect. Section 34 thereof

expressly provides that one of the conditions of the ordinance going into effect is that the Legislature of Illinois should pass

“such statute or statutes * * * as may be necessary or appropriate to authorize or validate an ordinance containing such provisions as are incorporated in this ordinance, and to enable the same to be carried into effect, including the organization of a corporation of the character and having the authority and powers in this ordinance provided to be exercised by the Company.”

It is therefore obvious that under that plan additional legislation was contemplated and is necessary.

Second. Mayor Thompson's Traction District Plan specifically provides for the passage of an act creating the “Transportation District of Chicago,” with power to acquire, operate and develop the traction properties and to levy taxes and issue bonds.

It is obvious therefore that the Mayor's plan was predicated upon and requires additional legislation.

Third. Your plan of December 19, 1921, in brief contemplates the acquisition of the surface and elevated lines by the issuance of certificates payable solely out of the revenues or income to be derived from, and to be secured by a lien restricted to, the property so acquired, with provisions that the City will maintain a sufficient rate of fare to pay the interest on the certificates so issued, the operating and fixed charges of the properties and to create a sinking fund to pay the certificates at or before maturity. Your plan, as do those above mentioned, also contemplates the construction of subways and extensions of the traction system so as to give adequate transportation.

Your plan proposes to issue such certificates under the Municipal Ownership Act of 1913 (Hurd's R. S., 1919, 2358), which is in a general way a re-enactment with certain changes and modifications of the Mueller Act of 1903. It does not seem necessary here to discuss how far the provisions of the earlier Mueller Act may have been superseded or repealed

by this later legislation. It is sufficient for the present purpose to find in the later act of 1913 ample authority for such certificates as you propose to issue.

There are several questions which have already been decided by the courts in this connection: The certificates issued under the provisions of this Municipal Ownership Act of 1913 in our opinion would create a valid lien on the properties acquired. The constitutionality of that act has been sustained by the Supreme Court in *Springfield Gas and Electric Company v. City of Springfield*, 292 Ill. 236. The court said (at page 248):

“The legislature had the right and power to authorize and empower municipalities to own and operate public utilities. That is not questioned in this case. It is not questioned that the legislature had the power to prescribe the rates and charges or the limits of the same to municipalities, as it has done in the Municipal Ownership Act * * *.” (at page 249): “It is clear, therefore, that the legislature acted within its constitutional rights and powers in enacting the two statutes” (referring to the Municipal Ownership Act of 1913 and the Public Utility Act which was passed simultaneously with it) “and making different provisions in so far as the same were necessary to accomplish the purposes for which the two acts were enacted. It is equally clear that the legislature had the right and power to delegate to the municipalities the right of regulation and control of such municipally owned plants. Such right is clearly recognized not only in this state but in other states.”

The court there held that a public utility owned and operated by a municipality was not subject to the control of the State Public Utility Commission.

The validity of the Mueller Act was similarly recognized by the Supreme Court in *Lobdell v. City of Chicago*, 227 Ill. 218. The court there held the particular issue of certificates involved to be invalid but made it perfectly clear that if the certificates had been of a different form they would have been held valid and binding and that there was no con-

stitutional objection to the legislation itself. The court said (at page 236):

“If all that is proposed to be done in this case is to pledge the property, and its income, which is purchased with the proceeds of said street railway certificates when issued and sold to secure the payment of said certificates, then, under the doctrine of *Winston v. Spokane*, 41 Pac. Rep. 888, which has been approved in *City of Joliet v. Alexander* and *Village of East Moline v. Pope, supra*” (both of which were decisions of the Supreme Court of this State), “there would be no indebtedness, within the constitutional inhibition, created by the issue and sale of said street railway certificates and the execution of said trust deed or mortgage, as against the City * * *

“* * * In the *Pope* case * * * the court said:

‘In the case at bar it is manifest that if nothing but the income from the water works was pledged or could be reached to satisfy the principal and interest of the bonds the case would be within the meaning of the language last quoted (the language of the *Alexander* case); but here revenue of the Village, to be obtained by general taxation to the extent of one cent on the dollar of taxables, must be applied to the payment of this indebtedness if the income from the water works proves insufficient to satisfy it.’ ”

The language just quoted clearly indicates the distinction between the provisions of the certificates held to be invalid in the *Lobdell* case, *supra*, and those proposed to be issued under your plan.

On the authority of the foregoing cases and others which might be cited, we have reached the conclusion that your plan as above outlined can be legally carried out without further legislation.

Fourth. The plan submitted by Mr. Blair contemplates the grant of the right to operate “for a period of time * * * to be established by negotiations between the City and the other interested parties,” reserving to the City the right to acquire the properties by purchase at any time during the term of the grant, or by amortization of the

capital account of the companies out of the City's share of the earnings, etc. Mr. Blair's proposal is indefinite as to the length of the grant which he desires. Everyone understands that the City has authority to grant a franchise for a period not exceeding twenty years. His plan, however, further provides that the companies shall "receive a fixed annual return for the use of their properties amounting to 7 per cent interest on the then unamortized portion of the capital account."

Our opinion is that a provision of this character would be invalid because the City under existing law has no power to make contracts as to rates of fare with a private grantee of a franchise. The City has the power to fix rates of fare only when it owns or operates the utility.

In our opinion, therefore, this feature of Mr. Blair's plan would require additional legislation.

In the case of failure to agree with the companies on the price at which the existing traction properties can be acquired it becomes a necessary alternative of your plan and of the Mayor's plan to consider the acquisition of the properties by condemnation.

Section 7 of the Municipal Ownership Act provides that any city may acquire any public utility by condemnation of the same in the manner provided by law for the taking and condemning of private property for public use. This makes it necessary to proceed under the provisions of the "Eminent Domain Act" (Chapter 47, Hurd's R. S.). Under the provisions of that act, as well as under the constitutional limitations, it will be necessary to provide adequate and full compensation for the property taken contemporaneously with the condemnation thereof. Inasmuch as the City of Chicago, because of the limitations upon its indebtedness, cannot now issue further corporate bonds, the only way it could raise the amount necessary to acquire the traction properties through condemnation, would be by the issuance of public utility certificates under the Municipal Ownership Act or the Mueller Act or by special assessment levied on property

specially benefited pursuant to the provisions of Section 10 of the Municipal Ownership Act. In order to accomplish such condemnation, recourse to the courts would be necessary.

In rendering this opinion, we have, as above stated, attempted to pass only upon the specific question asked by you as to whether the several plans require additional legislation, or not.

Respectfully submitted,

WM. H. SEXTON,
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**Use of Traction Fund for the Construction of Subways
by the City, and Legal Obstacles in the Way
of Immediate Construction.**

February 9, 1922.

HON. ULYSSES S. SCHWARTZ, Chairman of the Transportation
Committee of the City Council.

Dear Sir:

In reply to your letter of February 7, inquiring whether in our opinion there are any legal obstacles in the way of an immediate construction of subways by the City and the use of the transportation fund for that purpose, we would say that it is our opinion that under existing legislation

(1) The City is authorized to begin the immediate construction of subways; and

(2) Can use the traction fund now on hand for that purpose.

In reply to your further inquiry as to what rights the City has under the ordinances of 1907 to require the exist-

ing surface lines to contribute toward such construction, we would state that in our opinion

(3) The Chicago City Railway Company and the Chicago Railways Company are bound under the terms of the 1907 ordinances to contribute an amount not to exceed five million dollars for the building of a system of subways described therein and to contribute further sums, without specific limit as to amount, for the building of extensions and additions to such subway system in the manner hereinafter more particularly set forth.

I.

THE POWER OF THE CITY TO BUILD SUBWAYS WITHOUT FURTHER LEGISLATION IS IN OUR OPINION CLEAR.

The case of *Barsaloux v. City of Chicago*, 245 Ill. 598, involved the right of the City to build subways and to make appropriations from the traction fund for that purpose. In that case the Supreme Court expressly held that the City had the right to build street railways either on the surface of the streets or below them or elevated above them. The court said in this connection:

“If the public interest should require that all or a portion of the street railways of a city should be constructed beneath the surface of the streets no valid reason is perceived why the power to meet such public necessity should be denied in respect to such subways that does not apply with equal force to surface and elevated street railways. Street railways, whether constructed above, below or on the surface of the streets, are intended to furnish the public with a convenient means of traveling from one part of a city to another. The primary use of streets is to accommodate travel in cities and towns, and since street railways afford the public increased facilities for street travel, the use of streets for this mode of travel does not impose any additional servitude on such highways.”

While it is true that the Supreme Court in this case based its conclusion that the City had the right to build subways

in large measure upon the Mueller Law of 1903 and found that the City had ample authority under that statute, it is our opinion that the right of the City to build subways existed prior to the passage of the Mueller Law and still exists quite independently of that statute. We believe that the right of the City to build subways can be supported on the general grant of authority by the Legislature to the City of control over the streets of the municipality as expressed in different provisions of the Cities and Villages Act. Paragraph 7 of Section 1 of Article 5, Chapter 24 of Hurd's Revised Statutes, authorizes the City

“to lay out, to establish, open, alter, widen, extend, grade, pave or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks and public grounds, and vacate the same.”

Paragraph 9 of the same section authorizes the City

“to regulate the use of the same.”

Paragraph 13 authorizes the City

“to regulate the openings therein for the laying of gas or water mains and pipes, and the building and repairing of sewers, tunnels and drains, and erecting gas lights: *provided, however,*” etc.

Paragraph 28 of the same section authorizes the City

“to construct and keep in repair bridges, viaducts and tunnels, and to regulate the use thereof.”

Paragraph 66 of that section authorizes the City to

“* * * pass and enforce all necessary police ordinances.”

Honorable George A. Carpenter (now of the United States District Court, but then sitting as a judge of the Circuit Court of Cook County) heard the *Barsaloux* case in the lower court and sustained the power of the City to build subways under the general grants of power made by the Legislature to the City in the Cities and Villages Act above referred to. Judge Carpenter in his opinion said:

“The municipality being but the agent of the State can only act in the manner directed by the Legislature,

but by reason of the powers granted by the Legislature to the City, it has supreme control over the streets for any lawful public purpose.

“The only test by which the City is governed in determining what use shall be made of the streets is, whether or not it is for the benefit of the public and to that end a legitimate use of the streets.

“Whether the fee simple title of the street be in the City or in the State, or in the abutting property owner, is immaterial. There is vested in the trustee a title co-extensive with the trust.

“We know that the municipality in the exercise of its lawful powers frequently grants franchises to telephone, telegraph, electric and gas companies, and itself builds sewers and constructs water mains beneath the surface of the street. The title to the street, wherever it may rest, includes, as does any fee simple title, rights above and below to an almost indefinite extent. The rights of the people are equally extensive. Whatever use the needs of the people demand will be permitted. That use may be above or below the surface. The street is more than the surface. What lies beneath the surface may not be the street proper, using the word in its ordinary sense, but it is none the less a part of what the law recognizes as the street.”

He then reviewed the growth of Chicago and showed the great increase in traffic which had developed, and said:

“No thinking man will say today that the building of a subway by the City of Chicago is not in the interest of the general public, and therefore a legitimate corporate purpose. If it is a legitimate corporate purpose, it may be built beneath the surface of the streets within the corporate limits.”

He then pointed out that the City of Chicago as a matter of fact has frequently exercised the authority to provide for the construction of conduits and other structures below the surface of streets, either for the use of the municipality or for the use of public utilities operating under franchises granted by the City. He said in this connection:

“As a practical proposition, evidencing popular contemporaneous and continuous construction of the powers granted in this respect under the general charter, the

City for years past has built and has operated and has permitted to be built and operated subways and tunnels; the telephone company and the gas companies and the electric light companies all maintain a certain species of tunnel or subway.

"This is a proper use of the streets, because of public necessity—no absolute physical necessity perhaps, but necessity born of advancement. Things today are regarded as necessary which fifty years ago might have been regarded as the most absurd scheme of luxury.

"The Illinois Tunnel Company under a grant from the City is operating a railroad for the transportation of goods in parts at least of the streets of the City of Chicago."

While it is true that the Supreme Court in its opinion in the *Barsaloux* case did not base its conclusion that the City had the authority to build subways upon the same broad grounds that Judge Carpenter did, it is to be observed that the Supreme Court did not in any way disprove the views of Judge Carpenter. The Supreme Court affirmed his conclusion as to the authority of the City to build subways, and it was, of course, unnecessary for that court to state all of the grounds upon which such conclusion could be supported.

Express recognition of the authority of the City to build subways is found in Section 42 of the Local Improvement Act passed by the Legislature in 1897 and amended in 1903 (Hurd's R. S. 1919, Chap. 24, Par. 548). In that section it is provided that:

"It shall be lawful to provide by the ordinance for any local improvement, any portion of the cost of which is to be defrayed by special assessment or special taxation, or by ordinance passed at any time before the confirmation of the assessment roll, that the aggregate amount assessed, and each individual assessment, and also the assessment against the municipality on account of property owned by the municipality and for public benefits, be divided into installments, not more than ten (10) in number: *Provided, however*, that any such special assessment or special tax levy for building sewers, *subways* or viaducts may in like manner be divided into not exceeding twenty (20) installments."

By this section provision is merely made for one possible method of defraying the cost of building "subways," *the power to construct which must have already existed in the City.*

The wide scope of the power of the municipalities over streets—and this includes the space above as well as that below the surface—has repeatedly been recognized by the courts of this State.

In an early case decided in 1859, *Moses v. Pittsburgh, Ft. Wayne and Chicago Railroad Co.*, 21 Ill. 516, Judge Caton in delivering the opinion of the court said:

"A street is made for the passage of persons and property; and the law cannot define what exclusive means of transportation and passage shall be used. Universal experience shows that this can best be left to the determination of the municipal authorities, who are supposed to be best acquainted with the wants and necessities of the citizens generally. To say that a new mode of passage shall be banished from the streets, no matter how much the general good may require it, simply because streets were not so used in the days of Blackstone, would hardly comport with the advancement and enlightenment of the present age. Steam has but lately taken the place, to any extent, of animal power for land transportation, and for that reason alone, shall it be expelled from the streets? For the same reason camels must be kept out, although they might be profitably introduced. Some fancy horse or timid lady might be frightened by such uncouth objects. Or is the objection not in the motive power used, but because the carriages are larger than were formerly used, and run upon iron and are confined to a given track in the street? Then street railroads must not be admitted—they have large carriages which run on iron rails and are confined to a given track. Their momentum is great and may do damage to ordinary vehicles or foot passengers. Indeed, we may suppose or assume that streets occupied by them are not so pleasant for other carriages or so desirable for residences or business stands, as if not thus occupied. But for this reason the property owners along the street cannot expect to stop such improvements. The convenience of those who live at a greater distance from the center of a city requires the use of such improve-

ments, and for their benefit, the owners of property upon the street, must submit to the burthen when the common council determine that the public good requires it. Cars upon street railroads are now generally, if not universally, propelled by horses, but who can say how long it will be, before it will be found safe and profitable to propel them with steam, or some other power beside horses? Should we say that this road should be enjoined, we could advance no reason for it which would not apply with equal force to street railroads; so that consistency would require that we should stop all. Nor would the evil which would result from the rule we must lay down stop here. We must prohibit every use of a street which discommodes those who reside or do business upon it, because their property will else be damaged."

In *City of Chicago v. Rumsey*, 87 Ill. 348, in which the power of the City to build the La Salle street tunnel was sustained, the Supreme Court said at page 364:

"There is no principle upon which the right to locate a railroad upon a street, as a legitimate use of the street, can be sanctioned which will not also sanction the construction of a tunnel in a street. The tunnel does not change the character of the street or apply it to a new use. It imposes no new servitude, and is for the convenience of passage by the ordinary modes of travel in a street. Its inconvenience, and the only cause of its injury to adjacent property holders, is in the fact that it necessitates excavations and embankments, and thereby obstructs or incommodes passage from the one side of the street to the other. This is also, however, quite frequently, if not universally, the case where railroads are located in the streets, and sometimes by the mere change of the grade in the street; and where there can be no recovery for damages sustained by these improvements, it is impossible there can be for the simple act of construction of a tunnel, which produces precisely the same injury."

It is true that a special statute had been passed by the Legislature authorizing the construction of this La Salle street tunnel, but the language above quoted shows the broad scope of the power of the municipality over streets and the

space beneath the surface even in the absence of special legislation.

In *People v. Field & Co.*, 266 Ill. 609, an information had been brought by the state's attorney to enjoin the use of the passageway under Washington street built by Marshall Field & Company under an ordinance passed by the City Council. Mr. Justice Carter in delivering the opinion of the court said (p. 618):

"No absolute or iron-clad rule can be laid down with reference to what encroachments or obstructions upon the streets can be permitted by the municipality. The question, by the great weight of authority, always comes back to the point, are these obstructions or encroachments unreasonable and against the public interest? (3 McQuillin on Mun. Corp., Sec. 1334) * * * The use of the streets must be extended to meet the new needs of locomotion both above and below the surface of the ground. * * * The right of the public in the city streets necessarily includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper * * *" (p. 619) "This court, in holding that the City of Chicago could contract for the building of street railways in subways, stated that it was not improbable that in that city, in order to have a complete system of such railways, it would become necessary not only to build them upon but above and below the surface of the streets. *Barsaloux v. City of Chicago*, 245 Ill. 598. * * * This court has stated that cities, in controlling and improving streets, are charged with the unquestioned duty of preparing them for public use at such time and in such manner as the public necessities may require; * * *" (p. 624) "It is obvious from the authorities already cited that the decisions of this court rule more strictly with reference to encroachments on the streets above the surface of the ground, than to encroachments beneath the surface. * * * This subsurface of the streets recently has been taken for almost every sort of a public use. In addition to sewers, water-mains and public utilities generally, we find this space used for public lavatories, public cisterns and other kindred public conveniences. It would be difficult, if not impossible, to anticipate with any reasonable certainty

the future uses, either above or below the surface of the street, which may be required in the interests of the public. * * * Under our constitutional provisions as construed by this court, cities, within certain general limitations, have the authority to declare the general policy in regard to the control of streets. (*Palmer v. City of Danville*, 154 Ill. 156; *Venner v. Chicago City Ry. Co.*, 258 id. 523.) In the absence of a contrary showing this court will presume that the municipal authorities, in passing on matters of this kind, have acted for the best interests of the city. (Citing cases) * * * (p. 626) "If the needs of the public require a subway for passenger travel at any time within the life of this ordinance and the municipality decides that a subway shall be located at this point in Washington Street, the ordinance gives ample authority for the city to revoke all rights created thereunder. * * *" (p. 627) "Under the authorities in this as well as other jurisdictions, if the subsurface of the street is needed by the public for travel or other public uses, the mere fact that such public use will deprive abutters of the use of vaults and other similar underground structures in the street theretofore maintained, cannot stand in the way of the construction of sewers or subways. 'Abutters are bound to withdraw from the occupation of streets above or below the surface whenever the public needs the occupied space for travel.' *Sears v. Crocker*, *supra*; *Tacoma Safety Deposit Co. v. City of Chicago*, *supra*; *Fifty Associates v. City of Boston*, 88 N. E. Rep. (Mass.) 427."

It is to be noted that in this opinion it is assumed throughout that the City had the authority under existing legislation to build subways for transportation purposes. The court stated the general powers of the City over space beneath the surface of the streets in very broad terms.

In *Sears v. City of Chicago*, 247 Ill. 204, dealing with the right of the City to charge compensation for the use of the sub-sidewalk space, the court said at page 216:

"Whatever may be the rule in other jurisdictions, the law is settled in this State that a city may, under the power of exclusive control of its streets, allow any use of them which is not inconsistent with the public objects for which they are held." (Citing a large number

of Illinois authorities). "And it is equally well settled that the City may regulate such use and fix a reasonable compensation to be paid for the same" (Citing authorities).

The court held in this case that the power of the municipalities over streets in which it owned the fee was without any limitation except that the exercise of its right should be reasonable, and that, while in cases where the City had only an easement the abutting property owner had the right to make reasonable use of the sub-sidewalk space, yet he could make only such use thereof as did not interfere with the full enjoyment of the easement which was held for the use of the public. The paramount right of the City to make any use of the space below the surface of the streets which was necessary or appropriate for public convenience was recognized by the court to exist in all the streets whether the fee or only an easement had been acquired by the municipality.

It is significant that after the passage of the Mueller Act in 1903 and after the decision in 1910 of the Supreme Court in the *Barsaloux* case construing Section 1 of the Act, the Legislature in the year 1913 passed the Municipal Ownership Law (Hurd's Revised Statutes 1919, Chapter 111A, Section 87, *et seq.*). By that act the Legislature granted to any city in the state the power to own or operate any public utility, and in the statutory definition of public utilities is included "the transportation of persons or property." Inasmuch as in the *Barsaloux* case the authority to own and operate "street railways" had been construed by the Supreme Court as including the power to construct subways, it would seem that this later enactment must be similarly construed as confirming such grant of power. If the Legislature had desired to change the law as laid down by the Supreme Court in the *Barsaloux* case and to deprive municipalities of the power to build subways as recognized in that decision of our Supreme Court, the Legislature in enacting the Municipal Ownership Law of 1913, dealing with this subject, would have made such purpose clear, and in the absence of such declara-

tion by the Legislature it must be assumed that it was content to leave such power in the municipalities of the State.

“Where a statute that has been construed by the courts has been re-enacted in the same, or substantially the same terms, the legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction.” 36 Cyc. 1153.

Kirby v. Runals, 140 Ill. 289.

Kelley v. Northern Trust Co., 190 Ill. 401.

McGann v. People, 194 Ill. 526.

In this connection we note in passing that Section 14 of the Municipal Ownership Act of 1913 provides that “This Act shall be deemed and construed to confer powers in addition to but not limiting those now existing.”

The extent of the authority of a municipality over the space below the surface of the streets and the growth of such authority, in order to accommodate the changing conditions and the increased demands of traffic, are dealt with by the highest courts of Massachusetts and New York in cases dealing with the construction of the subways in Boston and New York, respectively, these being the two cities where subway construction has been undertaken on the largest scale and where the legal problems presented have been comparable to those involved in the construction of subways in Chicago.

In *Sears v. Crocker*, 184 Mass. 586, the Supreme Court of Massachusetts said, in passing upon the power of the City of Boston to build a subway, page 587:

“The question whether the construction of the tunnel will create an additional servitude upon the plaintiff’s lands in the public streets lies at the foundation of these cases, and should be answered at the outset. The rules and principles applicable to such questions have often been considered by this court” (citing numerous Massachusetts cases). “In the last two cases the doctrine was stated broadly, in accordance with previous decisions, that *this public easement ‘includes every kind of travel and communication for the movement or transportation of persons or property which is reasonable and proper*

in the use of a public street.' In the early settlement of the country and in the location of streets in later times these ways were appropriated to the use of the public for the movement of persons and property from place to place, just as the adjacent lands were appropriated to the use of private owners. The original proprietors of lands in Boston and the original proprietors of lands in New York did not foresee the growth of population and business which has induced land owners to erect buildings fifteen or twenty stories high, and to excavate under them basements and cellars and sub-cellars to be ventilated by the use of engines, to be lighted by electricity, and filled with merchandise. They did not think that the surface of the streets would be insufficient for the use of the people with convenience and comfort in moving to and fro and passing in and out in the transaction of business or the pursuit of pleasure. *It is now a fact of common knowledge that the streets of those parts of Boston which are most crowded are entirely inadequate to accommodate the public travel in a reasonably satisfactory way if the surface alone is used.* Our system, which leaves to the land owner the use of a street above or below or on the surface, so far as he can use it without interference with the rights of the public, is just and right, *but the public rights in these lands are plainly paramount*, and they include, as they ought to include, the power to appropriate the streets above or below the surface as well as upon it in any way that is not unreasonable, in reference either to the acts of all who have occasion to travel or to the effect upon the property of abutters. The increase of requirements for the public within the streets of our large cities has probably equalled, if it has not surpassed, the increase of requirements for business along the streets."

In *Commonwealth v. Morrisson*, 197 Mass. 199, the Supreme Court of Massachusetts said:

"The easement acquired includes every reasonable means of transportation for persons and commodities, and of transmission of intelligence, which the advance of civilization may render suitable for a highway. Under this description, gas and water pipes, sewers, telephone, telegraph, electric light and power poles, wires and conduits, electric and horse railways, the Boston subway

and private railroads have been permitted within the limits of highway" (Citing many cases).

In *Fifty Associates v. City of Boston*, 201 Mass. 585, a case having to do with the Boston subway, the Supreme Court said:

"That the public easement in a street includes the use of the land below the surface as well as the use of the surface, and that a tunnel is a street use was established in *Sears v. Crocker*, 184 Mass. 586." (69 N. E. 327, 100 Am. St. Rep. 577). "It is also established that the Legislature might have authorized the building of this tunnel *without making compensation* for bringing to an end the use which the petitioner as owner of the fee had theretofore made of the land under the street. See *Boston Electric Light Co. v. Boston Terminal Co.*, 184 Mass. 566." (69 N. E. 346).

In the case of *Sun Printing and Publishing Association v. Mayor, etc., of the City of New York*, 152 N. Y. 257 (cited and relied upon by our Supreme Court in the *Barsaloux* case, p. 610), it was held by the Court of Appeals of New York that it was a proper "city purpose" within the meaning of the constitution of that state for a city to incur an indebtedness for the building of subways and a rapid transit system of transportation. In that case, as in the Massachusetts case above quoted, the court dealt at length with the ever increasing congestion of traffic in the streets of the city and held that it was for the common good and general welfare of the people to relieve such congestion and to afford more ready and convenient means for transportation. It was further held, as it has been frequently by the courts, that railroads like streets are highways and that the fact that the exclusive use of such railroads might be granted to private corporations did not deprive them of their public character. It is a part of the duty of the municipality as the agent and representative of the State to provide facilities for the public to pass from one portion of the municipality to another without undue obstruction or inconvenience, and in securing facilities for such transportation the city is exercising the general police power vested in it to care for the health, welfare

and convenience of the public. In the opinion in the New York case it is stated (page 265) :

“Common highways have always been regarded as under the special care, supervision and control of municipal governments, upon which devolves the duty of keeping them in suitable repair *as well as the duty of providing sufficient ways to satisfy the requirements and answer the convenience of the public.* Highways are not only necessary for the welfare and convenience of the people, but are required by them. They are public in character and authorized by the legislature. * * * Highways have existed from the earliest times. They were constructed for the passage of persons and the carriage of goods. They may consist of a path through a wilderness, a pass over a mountain or a broad street in a populous city. * * * (page 266). There are ways for pedestrians, others for teams and vehicles, and still others for equestrians. If a highway may be constructed for these different uses, why may it not be constructed with rails upon which the millions may travel?

The foregoing discussion of the powers of the municipality over the streets and the space underneath them was expressly stated by the court to have been considered by it “independently of the provisions of the statute,” and the text of the discussion as well as the authorities cited shows that the court was dealing with the general rights of municipalities without regard to special legislation.

In the case of *Hayes v. Handley*, 187 Pac. 952 (Cal. 1920), the Supreme Court of California held that the construction of a traffic tunnel is a use which may be made of city streets without additional compensation to the abutting owners. The court said (page 955) :

“Authorities from other jurisdictions, moreover, confirm the conclusion that traffic tunnels must be recognized as a necessary part of a modern system of highways,”

and goes on to cite the Massachusetts case of *Sears v. Crocker* above referred to.

In the case of *Barsaloux v. City of Chicago* above referred to it was held by our Supreme Court that the fact

that the municipality grants to a street railway company as its lessee of a subway the exclusive use of certain tracks in such subway for the term of the company's franchise, does not amount to an exclusion of the public from the street and is not unlawful.

Certain provisions in the 1907 ordinances should be borne in mind in passing upon this question as to the power of the City to construct subways. Of course nothing contained in those ordinances could confer upon the City an authority which it did not otherwise possess as the agent or representative of the State; but it is important to note that in accepting those ordinances the companies have expressly waived any right to contest the existence of such authority, stipulating that they "admit that the City has the right and authority to construct subways and extensions of subways" and that they "consent to the exercise of such right by the City."

On the authority of the foregoing and of other cases which might be cited we are of the opinion that the City now possesses the power to construct subways.

The Supreme Court in the *Barsaloux* case, *supra*, of course was dealing with the provisions of the Mueller law, which did not require any referendum vote of the people upon an ordinance providing for the construction or acquisition of street railways. Under the later Municipal Ownership Act of 1913, it is provided that "no city shall proceed to acquire or construct any public utility under the provisions of this Act until an ordinance of the city council, providing therefor, has been duly passed and submitted to the electors of said city and approved by the majority of those voting thereon." Whether under this provision it would be necessary to have a referendum vote upon an ordinance providing for the construction of subways, is a question which need not be determined at this time but upon which we will, if so desired, advise you further.

II.

THE CITY HAS THE RIGHT TO USE THE TRACTION FUND FOR THE
CONSTRUCTION OF SUBWAYS.

In the traction ordinances of 1907 appears the following:

“It is further provided that, subject to the action of the city council of said city, the said city shall deposit the amount so paid to the said city” (referring to the 55% of the “net receipts”) “to the credit of a separate fund to be kept and used for the purchase and construction of street railways by said city; * * *”

In the *Barsaloux* case above referred to, it is expressly held that the City could make an appropriation payable out of the traction fund for the construction of subways or preliminary work in connection therewith. The court said (page 611):

“The only remaining question requiring consideration is whether the city may use the special traction fund for the purpose of acquiring or constructing subways. Section 24 of the Traction ordinance provides that the city shall deposit fifty-five per cent of the net earnings of the traction companies to the credit of a separate fund, to be kept and used for the purchase and construction of street railways by said city. Under this ordinance, clearly the city would have no power to divert this fund to general corporate purposes, but using it to construct subways is not a diversion of such fund. *The construction of subways is the construction of street railways, and is therefore the identical purpose for which such funds may be used.*”

III.

THE SURFACE LINES CAN BE REQUIRED BY ORDINANCE TO CONTRIBUTE \$5,000,000 TOWARD THE BUILDING OF AN INITIAL SUBWAY SYSTEM AND ADDITIONAL SUMS, WITHOUT SPECIFIC LIMITATION OF AMOUNT, FOR EXTENSIONS AND ADDITIONS THERETO.

Section 6 of each of the ordinances of February 11, 1907, granting certain rights to the Chicago City Railway and the

Chicago Railways Company respectively, contains elaborate provisions as to the power of the City to require these companies to join "in defraying the cost of the construction of a system of subways for the joint use of said companies as downtown terminals of their street railway systems, and for the use of said city and of its licensees." It is expressly declared that "the legal title to said subways is to be in said city, subject to the rights of said companies under these Ordinances, it being, however, an express condition of the company being required to join in defraying the cost of such construction of such system of subways that said subway system and the extensions thereof shall not be used for street railway purposes *during the life of this grant*, except by the street railway systems of said companies." The ordinances further provide for the payment by the companies of the *pro rata* cost of that part of this initial subway system which is to be devoted to the use of the companies in an amount not to exceed \$5,000,000, exclusive of the cost of reconstructing the present tunnels under the Chicago river and of converting said tunnels into a part of said system of subways.

The ordinances expressly provide that, "*The limitation of \$5,000,000, as above defined, shall apply to the subway system above mentioned, but shall have no application to the extensions and additions herein next mentioned.*" (Sec. 6) Provision is then made for the payment by the companies of additional sums, *without any specific limitation as to amount*, toward the cost of constructing extensions and additions to the subway system after the initial system of subways as above defined has been fully completed. The only limitations found in the ordinances on the additional amounts so to be contributed by the companies to extensions of and additions to said initial subway system are:

(1) That such payments shall not exceed the *pro rata* cost of constructing that portion of such extensions which is to be devoted to the use of the companies; and

(2) that the companies shall not be required "to increase their total capital investment to such an extent

that the return thereon over and above the interest charge of 5% thereon, by these ordinances authorized, would be reduced to an inadequate or unreasonably small amount" (Section 25).

The only conditions set forth in the ordinances for the exercise of such power of the City to require the surface lines to contribute to the construction of subways are:

(1) That the city shall pass an ordinance, prescribing the location, character and extent of the subway system and the plans and specifications therefor, including provisions specifying the portions thereof to be devoted to the use of said companies respectively and to the use of the city and its licensees and regulating the manner of such uses and specifying the share of the cost of the subway system to be borne by the companies and the extent of the uses to which the companies shall be entitled and

(2) the approval by the Board of Supervising Engineers and the location, character and extent of and the plans and specifications for such subway system.

In the *Barsaloux* case, above cited, the Supreme Court commented upon these provisions of the ordinances which we above referred to. The Supreme Court said (page 609):

"It will be remembered that if any subways are constructed under the traction ordinances, the legal title to such subways will be vested in the City of Chicago. The ordinances provide that the traction company shall contribute to the cost of such subways to an amount not exceeding \$5,000,000. *Such contribution to the cost will not create a partnership or joint ownership in the subways.* The traction companies will have the privilege of using the subways *during the remainder of their term* in accordance with the ordinances under which they are now operating, unless the city should sooner elect to exercise its right to take over, by purchase, the street railway systems of the city. The relation of the city and the traction companies, in so far as the subways are concerned, would be that of lessor and lessee."

On page 612:

“The traction companies cannot be compelled to contribute to the cost of such subways until an ordinance is passed by the city council describing in detail the character of subways to be constructed and the plans and specifications are approved by the Board of Supervising Engineers.”

There is nothing in the decisions of the Supreme Court of this State or of the Supreme Court of the United States, which would in any way weaken the effect of the contractual obligations incurred by the surface lines in agreeing in the 1907 ordinances to contribute to the cost of constructing subways in the manner above outlined.

In *City of Chicago v. O'Connell*, 278 Ill. 591, the court held that the Public Utility Commission of the State had the authority to make orders binding upon the traction companies which were opposed to certain of the provisions of these ordinances, but these orders had to do exclusively with matters of service and the rates of fare which the companies could charge therefor. The court expressly recognized that, except to the above extent, the 1907 ordinance imposed binding obligations upon the parties. Mr. Justice Cook in delivering the opinion of the court, at page 605, said:

“Appellees contend, however, that the settlement ordinances and the unification ordinance, having been accepted and acted upon by the railway companies, constitute binding contracts between the city and the railway companies, and that their obligation cannot be impaired by any act of the legislature or by any order of the State Public Utilities Commission. Appellees' contention is undoubtedly sound so far as the contracts relate to matters which do not affect the public safety, welfare, comfort or convenience. Thus, the grant of the right to the railway companies to construct and operate street railways in the city, the agreement to divide the net receipts between the railway companies and the city, and the option given to the city to purchase the railway properties at a certain price are all matters which do not affect the public safety, welfare, comfort or convenience, because it is immaterial to the public what

person or corporation operates the street railways or what disposition is made of the profits, and over those matters neither the State nor the State Public Utilities Commission has any control by virtue of the police power.”

See also *Chicago Railways Company v. City of Chicago*, 292 Ill. 190, 198.

The validity of the 1907 ordinances had already been recognized repeatedly prior to the decision in the *O’Connell* case, *supra*, by our Supreme Court. (See *Venner v. Chicago City Railway*, 236 Ill. 349; *Venner v. Chicago City Railway*, 258 Ill. 523; *People v. Chicago*, 270 Ill. 188).

It is true that there is now pending a bill filed on behalf of the City, in which it is contended that the surface lines have by reason of violations of the terms of the 1907 ordinances forfeited all rights thereunder, and, if the City’s contentions in that behalf are sustained, it would seem that the reciprocal obligations assumed by the surface lines to contribute towards the cost of the construction of subways would be rendered unenforceable. Whether it is wise for the City to continue to seek to establish the unenforceability of the 1907 ordinances, in view of the fact that by so doing the City would endanger its right to call upon the surface lines to contribute \$5,000,000 towards the construction of the initial system of subways and millions of dollars in addition towards extensions and additions is a question of policy upon which the City authorities should pass, and upon which we, of course, express no opinion.

Of course, we do not intend to say that the inability of the City—by virtue of the continuance of this forfeiture litigation—to compel the companies to pay these millions of dollars toward the construction of a subway system and additions and extensions would in any way affect the power of the City to proceed forthwith with the construction of the subway and to use the amount now in the traction fund for that purpose.

It will be observed from the foregoing that the City has the option to proceed to construct the subways with-

out calling on the companies to make contributions thereto, and in such case, the companies, in our opinion, will not have any right to use such subways.

If the surface lines should be required, as above set forth, to contribute to the cost of building the subways, their rights therein would be limited to the period of their grant. This appears from the specific provisions of the 1907 ordinances and was recognized by the *Barsaloux* case, in which the Supreme Court stated in the excerpt already quoted that

“the traction companies will have the privilege of using the subways *during the remainder of their terms* in accordance with the ordinances under which they are now operating, unless the city should sooner elect to exercise its right to take over, by purchase, the street railway systems of the city.”

Even if the surface lines are required, pursuant to the terms of the ordinances, to contribute in the manner above set forth, to the cost of constructing the subways and the additions and extensions thereto, the City will have the right to use for other purposes such portions of the subways as are not devoted to the use of the surface lines. It is expressly provided in the ordinances, as above pointed out, that the surface lines may be required to contribute to the construction of subways “for the joint use of said companies * * * and for the use of said *City and its licensees*.” It also would be possible for the City to provide in such subway galleries for water mains, sewers and underground facilities of the several public utilities now in the streets.

The only express provision in the ordinances with reference to the use of the subways by the elevated lines, is found in the latter part of Section 6, where it is provided that if that portion of the subways devoted to street railway purposes shall at any time be greater than necessarily and properly required for the use of the companies which have contributed to the cost of the subways,

“the City may authorize or require any other company operating elevated railways in said city to use

said subways and extensions, or parts thereof, to the extent of such surplus capacity, but only to such extent,"

and further:

"The City shall have the right to use the subways and extensions for any elevated railway belonging to said City to the same extent and upon the same terms that it may authorize or require their use by any elevated railway company."

From this and other provisions of the ordinances it appears that if the City does not exercise its option to require the surface lines to contribute to the cost of constructing subways, then it would have the right to use all or such portion of the subways as it might desire for the elevated lines or for such other lines as might be licensed or constructed and operated by the City itself.

In addition to the three questions which we have thus far considered, you inquire in your letter whether in our opinion an appropriation payable out of the traction fund could legally be made in the Annual Appropriation Ordinance for the year 1922 of such amount as the council deems necessary for the construction of subways during this year. As we have already pointed out, the Supreme Court in the *Barsaloux* case specifically decided that an appropriation of that character was legal, and held that a bill in equity by a taxpayer seeking to enjoin such appropriation could not be sustained.

Respectfully submitted,

STEPHEN A. FOSTER,
WM. H. SEXTON,
JEROME N. FRANK,

Counsel for the Local Transportation Committee.

Proposed Comprehensive Plan for Settlement of Traction Problem.

June 26, 1922.

TO THE CHAIRMAN AND MEMBERS OF THE SUB-COMMITTEE ON
FOMULATION OF A TRACTION PLAN, LOCAL TRANSPORTA-
TION COMMITTEE OF THE CITY COUNCIL OF THE CITY OF
CHICAGO:

Pursuant to the action taken by your sub-committee at the meeting of June 3, 1922, we have prepared and submit herewith a draft of a proposed ordinance entitled:

“An Ordinance authorizing the City of Chicago to acquire, construct and own street, elevated and sub-way railways within its corporate limits, which shall constitute its Municipal Railway System, and to issue public utility certificates for that purpose.”

This proposed ordinance provides the means for a general settlement of the traction problem and for establishing a comprehensive transportation system for the City of Chicago.

The desire of the people of this City, frequently expressed, for such a comprehensive system was again voiced by Mr. Edward E. Gore, president of the All-Chicago Council, at the meeting of your committee held on June 3, 1922. The All-Chicago Council, embracing within its membership more than 100 organizations of citizens and business men residing in different sections of the City, has been recognized by your committee as a body representative of the people of the entire City. We were instructed by your committee to co-operate with the All-Chicago Council in the preparation of an ordinance which would adequately meet the needs of the City. We have accordingly conferred with a committee representing that council in this connection and received the benefit of their helpful suggestions.

MR. GORE'S STATEMENT AND MR. BUSBY'S LETTER.

Mr. Gore, on behalf of the All-Chicago Council, expressed the view to your committee that a comprehensive plan, including both street railways and elevated railways, could be carried out only through municipal ownership. He stated that in his opinion the day had gone by when local transportation enterprises privately owned could "get the money to sustain themselves." In referring to the conclusion of the All-Chicago Council that municipal ownership is desirable and necessary, he said:

"That action was not taken without a full understanding of the fact that in order to have these properties municipally owned, it will be necessary to have recourse to a plan similar, if not identical, with the one proposed by the chairman of this Committee, and the issuance of such certificates and other evidences of indebtedness by the City as may be legally issued and used in the acquisition of such lines, and for the construction of additional lines."

It is noteworthy that at the same meeting a letter dated June 2, 1922, from Mr. Leonard A. Busby, president of the Chicago City Railway Company, was read, in which he stated:

"I do not believe * * * that any plan looking to the extension of the period of private ownership and operation would be approved. This situation cannot be gainsaid, and in my opinion, must be reckoned with. After all, the question of ownership is not as important as the problem of providing an adequate transportation system."

Mr. Busby's letter then discussed the plans pending before your committee looking to public ownership. Referring to the plan submitted by the chairman, he said,

"If these certificates are marketable, the Schwartz Plan would appear feasible."

MUNICIPAL OWNERSHIP IMPERATIVE AND DESIRABLE.

The conclusion, independently arrived at by Mr. Gore and by Mr. Busby, that the day of private franchises for local transportation companies has passed in great metropolitan centers such as Chicago, in our opinion, is in accord with the best thought of those who have been dealing with such local transportation problems and the difficulties incident to financing private undertakings on such a large scale. The expenditures required for the continual extension of local transportation facilities in a growing city, for supplying additional and up-to-date equipment, and for the construction of subways, are so great that private companies, especially when relying upon franchises running for a short period of years, cannot successfully finance them. Mr. Busby stated in his letter that it was estimated in the Parsons-Arnold-Ridgway report of 1916, that an initial construction program for a six-year period, supplying more than double the present rapid transit facilities during the rush hours, would cost a minimum of \$86,000,000, and that a completed plan for 58 miles of single track subway, 157 miles of single track elevated extensions, and 529 miles of single track surface line extensions would cost a minimum of \$275,000,000.

Obviously no such sums of money can be raised by the existing Surface Lines, dependent as they are upon short term franchises, nor could they, we believe, raise any such sums, even if the laws of the State were so altered as to permit the granting of longer or indeterminate franchises. Further, we believe, it has been demonstrated that the people of Chicago are not in favor of granting such longer or indeterminate franchises to privately owned companies. Under existing laws no franchise in excess of twenty years can be granted to any street railway company. With the recurrence of periods, such as the present, when the twenty-year franchises are about to expire, it is impossible for such private companies to finance such huge expenditures. This is well illustrated by the inability in recent years of the Sur-

face Lines to finance the construction of extensions prescribed by the 1907 ordinances. Toward the expiration of twenty-year franchises, the securities of the companies operating thereunder are depreciated, undoubtedly because of fear in the minds of the investors concerning what will happen at the expiration of the franchise term.

We do not have to speculate as to what is the public policy of the people of this City and State. Chicago has already declared itself in favor of municipal ownership of its local transportation system. In 1903, at the instance of the people of this City, the Illinois General Assembly passed the so-called "Mueller Act" authorizing municipalities to own and operate (if such operation should be approved by a vote of the people) its street railways. That act was adopted by the City of Chicago at an election held April 5, 1904. In 1913, likewise at the instance of the people of this City, the General Assembly passed the Municipal Ownership Act. This act provides that the proposition to *own* public utilities should be approved by a vote of the people, and that the proposition to *operate* such utilities should be approved on a *separate* referendum vote.

In 1906 an effort was made to carry into effect the decision of the people of this City to acquire the ownership of the Surface Lines through the issuance of Mueller Act Certificates as provided in said act of 1903. On January 18, 1906, the City Council passed an ordinance providing for the issuance of \$75,000,000 of such certificates for the acquisition of the Surface Lines, and on April 3, 1906, said ordinance was adopted by a majority of the electors. Chicago's effort so to obtain municipal ownership was defeated, however, because of the decision of the Supreme Court in the *Lobdell* case (*Lobdell v. City of Chicago*, 227 Ill. 218). The court there held that the certificates of the character then proposed to be issued would constitute an indebtedness of the City and that the amount thereof would increase the City's indebtedness to an aggregate far in excess of the constitutional limitation.

The reason such Mueller Act Certificates authorized in 1906 and considered by the court in the *Lobdell* case were held by the court to create an indebtedness of the City, was that those particular certificates were secured by a mortgage deed of trust providing that in the event of foreclosure of the properties, the purchaser at the foreclosure sale should have a franchise to operate such street railway properties for twenty years from the date of such foreclosure. The court held that the right to operate street railways in the streets of Chicago was an asset of the City "and that such right in no way represents any part of the money derived from the issue and sale of said street railway certificates." The court therefore held that these certificates and the trust deed securing the same created something more than a purchase money mortgage, and because of that fact constituted an indebtedness.

The *Lobdell* case and other authorities were discussed by us in our opinion of February 1, 1922. We there pointed out that the Supreme Court in the *Lobdell* and other cases dealing with similar situations had expressly recognized that public utility certificates of the general character authorized by the Mueller Act of 1903 and the Municipal Ownership Act of 1913 would be legal and valid if they were secured by a mortgage deed of trust which should be a lien solely on the property so acquired and made payable solely out of the revenues and income of such property, and therefore did not in any way impose upon the municipality any obligation or indebtedness payable out of its general funds.

The Supreme Court in the *Lobdell* case used the following language cited by us in our above mentioned opinion:

"If all that is proposed to be done in this case is to pledge the property, and its income, which is purchased with the proceeds of said street railway certificates when issued and sold to secure the payment of said certificates, then, under the doctrine of *Winston v. Spokane*, 41 Pac. Rep. 888, which has been approved in *City of Joliet v. Alexander* and *Village of East Moline v. Pope*, *supra* (both of which were decisions of the Supreme Court of this State), there would be no in-

debtedness, within the constitutional inhibition, created by the issue and sale of said street railway certificates and the execution of said trust deed or mortgage, as against the City * * *.

* * * In the *Pope* case * * * the court said:

'In the case at bar it is manifest that if nothing but the income from the water works was pledged or could be reached to satisfy the principal and interest of the bonds the case would be within the meaning of the language last quoted (the language of the *Alexander* case); but here revenue of the village, to be obtained by general taxation to the extent of one cent on the dollar of taxables, must be applied to the payment of this indebtedness if the income from the water works proves insufficient to satisfy it.' "

It is to be observed in this connection that under the provisions of the Constitution of this State, the borrowing power of the City of Chicago on its general credit municipal bonds is practically exhausted, and that it is only through the issuance of such public utility certificates as shall not create a debt, that the City can acquire municipal ownership of public utilities.

As we pointed out in our opinion of February 1st, it is now legally possible for the City of Chicago to issue its public utility certificates which shall be a first lien upon the Municipal Railway System acquired or constructed by or through the issuance thereof and payable solely out of the revenues and income of such system, without recourse, under any circumstances, to funds raised by taxation.

The advantages of such ownership of a Municipal Railway System are obvious. Among these are the following:

(a) *Private Financing on Short Term Franchises Impossible.*

The evils incident to short term franchises and the forms of financing necessarily undertaken thereunder will be avoided. Bonds issued by private companies operating under such franchises necessarily cannot run beyond twenty

years. There is, on the other hand, no constitutional or statutory limitation upon the length of time for which public utility certificates may run. The twenty-year limitation in the Constitution upon the term for which general credit municipal bonds can be issued has no application to public utility certificates of the character now under discussion.

(b) *Funds for Extensions, etc., Obtainable at Lower Interest Rates.*

Funds can be obtained at lower rates of interest on such public utility certificates than would be possible on securities issued by private corporations acting under short term franchises. Such result is brought about not only through the better credit enjoyed by municipal securities and the greater confidence of the public therein, but also by the fact that public utility certificates, being municipal securities, in our opinion, would be held exempt from taxation under the Federal Income Tax Law.

The cost of financing an adequate local transportation system is a large factor in the cost of the service rendered to the people, and therefore any saving in the cost of raising the necessary funds would be reflected in the reduction of the rates of fare charged to the users of such transportation system.

(c) *Private Profits (Surface Lines—Last Year \$2,410,000) Eliminated—Service at Cost.*

By establishing its own Municipal Railway System, the City of Chicago will secure for the people service at cost, thus eliminating the profits which are always sought and, regardless of the inadequacy of the service, generally obtained under private ownership. As illustrating this conclusion, we call attention to the fact that the profits of the Surface Lines for the year ending January 31, 1922, after paying operating expenses and fixed charges (including interest at 5% on capital account) and after deducting the City's 55% of the divisible net receipts, were \$2,409,515.48. (See Table of Earnings below, p. 840.)

(d) *Sinking Fund Requirements Enable City to "Own Its Own Home."*

The City out of the earnings of the system will establish and maintain sinking funds for the payment of the certificates as they mature. Consequently when the certificates issued for the acquisition of any part of the system have matured, the cost of such property will have been entirely paid. The City will thereafter be the owner thereof without any further obligation to pay out interest on such original cost. By way of contrast we direct attention to the situation under private ownership where, ordinarily, the debt is not amortized and the car-riders continue indefinitely to pay interest on the capital invested.

As noted below, it will be possible for the City, even with a reduction of the rates of fare, to pay off these certificates within a reasonable period of years.

To use a homely but apt illustration this may be compared to the slogan—"Own Your Own Home," the City becoming the owner of the system ultimately free of debt instead of remaining a tenant perpetually paying rent.

(e) *Unification of Surface and Elevated Lines—Through Routes and Single Fare—Better Service.*

Unification of the Surface and Elevated Lines will be made possible through municipal ownership, inasmuch as there is no legal obstacle in the way of the City's owning both of these properties. The situation will be altogether different from that which now exists. Under existing law the consolidation of the companies owning the Surface Lines with those owning the Elevated Lines is not possible. The statutes of this State permit only corporations of the same kind to consolidate, and the street railway companies are not organized under the same statute as are those companies operating the Elevated Lines.

If such unification is accomplished, the way will be open for the establishment of a single fare and transfers

for through transportation on the unified Surface and Elevated Lines.

It has long been recognized that the existing properties can be most efficiently and economically used by making the Surface Lines, for the most part, short-haul feeders to the Elevated Lines which would afford rapid transit for the long-hauls and through routes. Only through unification of ownership will this be feasible.

(f) *Home Rule of Local Transportation Restored to Chicago.*

Another decided advantage which the people of Chicago will secure through municipal ownership of its transportation system is the freeing of such system from control of the Illinois Commerce Commission and restoring to the City of Chicago and its City Council "home rule" over this important public utility. The Supreme Court of this State has already declared, in *Springfield Gas and Electric Company v. City of Springfield*, 292 Ill. 236, that municipally owned public utilities are not subject to control as to rates of fares or service by the State Commission. In that case (p. 249) the court said:

"It is equally clear that the legislature had the right and power to delegate to the municipalities the right of regulation and control of such municipally owned plants."

(See also same case in U. S. Supreme Court, 42 Sup. Ct. Rep. 24.)

THE COMPREHENSIVE PLAN.

Both Mr. Gore, in his statement, and Mr. Busby, in his letter, recognized that the working out of such a general transportation plan involved (I) the preparation of a physical plan, (II) the determination of a policy to be followed with reference to municipal ownership, and (III)

the determination of a policy with reference to operation of the municipally owned railway system.

The draft of ordinance submitted by us deals with each of these several phases of the problem presented.

I. PHYSICAL PLAN.

The physical plan includes the following items:

- (a) Existing Surface and Elevated Lines;
- (b) Extensions thereof and
- (c) Subways.

(a) *Existing Properties.*

The draft of ordinance submitted provides for the acquisition of the existing Surface and Elevated Lines. A detailed description of the properties so to be acquired is to be inserted in appropriate exhibits forming parts of the ordinance. The different possible methods of acquisition are specifically set forth in the ordinance and will herein be discussed.

(b) *Extensions to be Constructed.*

Mr. Gore, at the meeting of your committee, stated that the All-Chicago Council was engaged in the preparation of a map which would show the extensions in the different sections of the City desired by such council. Such map has been completed and is now before your committee for consideration.

The committee, in deciding whether all, or what portions of, these desired extensions should be made, will doubtless give careful consideration to the recommendations of the All-Chicago Council. We have had no opportunity to make any study of this map, and it would, of course, be altogether beyond our province to decide what extensions should be made,—this being clearly a question of policy for the determination of the committee. When so determined a de-

scription of the proposed extensions will be incorporated in exhibits to be attached to and made parts of the ordinance.

In this connection, the committee will, of course, have in mind the physical plan contained in the Parsons-Arnold-Ridgway report of 1916, which physical plan already has been endorsed by your committee. Of that physical plan, Mr. Busby in his above letter states that it is

“the best considered plan that has as yet been presented for a transportation system, adequate for the present and future needs of our city. With a few minor changes to meet developments during the past six years, this plan is as good today as when formulated. * * * This general plan meets our needs, both present and future, by providing rapid transit to every section of the city by means of subways and elevated lines. It reduces downtown traffic congestion by providing rapid transit routes outside of this district, and relieves downtown surface congestion by putting a considerable part of the surface cars in subways. The details of this plan are familiar to your committee. The plan was economically sound in that it utilized existing facilities, limited expensive subway construction as much as possible, and thereby gave the greatest amount of rapid transit for the least expenditure of money.”

The committee will recall that the Parsons-Arnold-Ridgway report recommended that the construction program therein outlined should be divided into three periods of three years each, and it is possible that your committee will decide that some such similar method should be adopted in dealing with the extensions now to be authorized, that is to say, that certain authorized extensions should be constructed immediately and during an initial period and that others of such extensions should be postponed to later successive periods. As we understand it, a similar classification in this regard will be recommended by the All-Chicago Council for the construction of the several extensions which it desires.

(c) *Subways.*

In the draft of ordinance submitted, we have not attempted to outline the subways to be constructed. Mr. Gore,

in his statement on behalf of the All-Chicago Council, expressed opposition to the construction of downtown subways independently of a comprehensive transportation plan, but stated that he recognized the construction of subways as a necessary part of such plan.

This conclusion that subways should be constructed by the City as an integral part of a comprehensive plan is, as we understand it, the view of your committee, but you have not yet determined what subways shall be built. Your committee has before it for consideration the Report on Initial Subways dated March 22, 1922, submitted by the committee of engineers, consisting of Messrs. Bion J. Arnold, R. F. Kelker, Jr., Harold Almert, Charles E. Fox and J. H. Prior, our report of June 1, 1922, and the two alternative drafts of subway ordinance submitted therewith.

The alternative drafts of subway ordinance submitted on June 1, 1922, pursuant to your instructions, provide for the use of the "Traction Fund" for the construction of such initial system of subways as the City Council may authorize and the people on referendum vote may approve. We are of the opinion that if the Traction Fund be used for the construction of the initial system of subways such use should be provided for by an ordinance confined to such subject-matter and separate and distinct from the comprehensive ordinance of the kind submitted herewith. In our opinion it would be legally objectionable in one and the same ordinance to provide for the use of the Traction Fund in the construction of subways, and for the issuance of public utility certificates for the acquisition or construction of other parts of the proposed Municipal Railway System. Such an ordinance would raise serious questions under the doctrine of the *Lobdell* case as to the validity of such certificates. That case decisively determined, as already pointed out by us, that public utility certificates which shall be a lien, directly or indirectly, upon any asset of the City acquired in any manner other than through the issuance of such certificates would be invalid. Therefore if the City were to issue

certificates constituting a lien upon subways or other property acquired or constructed through the use of the Traction Fund as well as upon property acquired through the issue of such certificates, the courts would hold invalid such certificates.

While, for the reasons above stated, it is our opinion that if the Traction Fund is to be used in the construction of an initial system of subways, provision therefor should be made by a separate ordinance, there is no legal reason why such ordinance should not be a part of the comprehensive plan and be submitted to the voters at the same election with the comprehensive ordinance.

Whatever decision may be reached by your committee in that regard, we suggest that provision be made in the draft of the ordinance herewith submitted making appropriate reference to subway construction. If your committee decides not to use the Traction Fund for the construction of subways and decides to reserve it for some other purpose, we can incorporate provisions in the draft of ordinance submitted authorizing the issuance of public utility certificates for the construction of the initial system of subways and of additional subways. Whatever method of financing the construction of the initial system of subways may be adopted by your committee, we can incorporate in the draft of ordinance herewith submitted provisions for the construction of additional subways through the issuance of such public utility certificates.

We repeat, however, that the Traction Fund cannot legally be used for the construction of subways or for the acquisition or construction of surface or elevated railways which in any way shall become subject to the lien of the mortgage deed of trust securing the certificates to be issued.

We also suggest that the construction of subways which are not a part of a larger transportation system probably cannot be financed through Municipal Railway Certificates for the reason that the marketability of such certificates is dependent upon their being secured by income-producing

property, and a subway standing by itself, we are advised, would not be income-producing.

For the reasons above stated we await further instructions from your committee before attempting to incorporate any definite provisions, in the ordinance submitted herewith, in relation to the construction of subways.

II. MUNICIPAL OWNERSHIP.

In our opinion the only plan for bringing about municipal ownership which can be carried out without additional legislation is the plan heretofore proposed by your chairman and embodied in the draft of ordinance submitted herewith. We have provided that upon the passage of the ordinance and upon its approval by the vote of the people of Chicago, the City may issue such public utility certificates (to be known as Municipal Railway Certificates) in an amount designated therein.

We will now refer more particularly to those provisions of the draft of ordinance submitted pertaining to the financial and legal questions involved.

(1) REFERENDUM.

The draft of ordinance is submitted with the suggestion that such ordinance, if passed by the City Council, shall be referred to the voters at the earliest election possible. It is not necessary to postpone such action until a contract shall have been made with either the existing Surface Lines or Elevated Lines for the acquisition of their properties. It is believed that such early referendum will be advantageous to the City and all parties concerned. It will give the people of the City an opportunity to express themselves on the general plan proposed. Such ordinance, if passed, and so approved, will vest in the City authority to issue from time to time Municipal Railway Certificates, if and whenever necessary, for the purpose of acquiring the existing railway properties, either by purchase or condemnation, and constructing extensions thereof.

If, after such a referendum, a taxpayer should institute a proceeding in the courts attacking the legality of the proposed action, the decision of the Supreme Court in such proceeding will determine the validity of such certificates. It must be conceded that if the validity of the ordinance and of such certificates shall be sustained, a more satisfactory basis will have been established for the acquisition of the properties, either through negotiation and purchase or by condemnation.

(2) AMOUNT OF ISSUE.

The draft of ordinance leaves for the determination of your committee the amount of the issue which will be authorized by the ordinance when passed by the City Council and approved by a vote of the people. Under the terms of the Municipal Ownership Act such certificates can be issued only to the extent of the cost of the property acquired thereby and ten per cent in addition thereto. It is impossible to determine in advance what will be the cost of acquiring the existing surface and elevated railway properties, of constructing extensions thereof and of building subways, and it is not in any way necessary to determine that question at this time. The amount of certificates ultimately to be issued will of necessity be governed by the actual cost of the properties acquired or constructed, plus not to exceed ten per cent, as provided in the statute. This does not mean, of course, that the City must issue such certificates to 110 per cent of the cost of the properties, but means that when financial conditions so require, such certificates may be sold below par, but in no event below approximately 91 per cent of par. The maximum amount to be named in the proposed ordinance should be ample to cover all of these possible expenditures, and only such part of the certificates so authorized will ultimately be issued as may be necessary for the purposes above mentioned.

The conditions upon which these certificates may from time to time be authenticated by the trustee under the mort-

gage deed of trust securing the same and issued by the City are set forth in detail in Article Three of the form of mortgage deed of trust appearing in the draft of ordinance submitted, and are in brief as follows:

(a) *Issuance of Certificates for Existing Surface and Elevated Properties.*

It is provided that, in the event that either or both the surface and elevated railway properties are acquired by the City through negotiation and purchase and an agreement to that effect is duly entered into by the City, a sufficient amount of the Municipal Railway Certificates shall be authenticated and issued to pay for the properties so acquired, upon the vesting of title to such properties in the City and upon the conveying of the same by appropriate instruments to the trustee as part of the security for the certificates to be issued.

Condemnation Proceedings Possible.

The Municipal Ownership Act of 1913 expressly authorizes the City, in acquiring public utilities, to condemn all or any part thereof in the method provided in the Eminent Domain Act. The way, therefore, is open for the City to acquire in such manner such of the surface and elevated railway properties as cannot be acquired at a reasonable price through negotiation and purchase. In the event that the City finds it necessary to acquire either or both of these properties by condemnation, upon the entry of an order of court for possession in such condemnation proceedings, a sufficient amount of said certificates shall be authenticated and issued to pay for the properties so condemned. If the companies whose properties are condemned refuse to accept these certificates in payment of the amount awarded to them in such condemnation proceedings, in our opinion arrangements can be made to sell such certificates, thereby obtaining the funds necessary to effectuate such acquisition by condemnation.

It is further provided in the mortgage deed of trust that the City shall not be confined to any one method for the acquisition of the existing railway properties, but may proceed either by negotiation and purchase or by condemnation to acquire all or any parts thereof.

Immediate Negotiations Possible.

It is of course impossible for anyone to predict at this time whether negotiations can be brought to a final conclusion for the purchase by the City of the existing surface and elevated railway properties. As an encouraging sign in this regard, it is to be noted that Mr. Busby, president of the Chicago City Railway Company, the Calumet and South Chicago Railway Company and The Southern Street Railway Company, in closing his letter to the chairman said:

“Speaking for the companies which I represent, I shall be glad, as soon as your committee is able to formulate any definite proposal along these lines, to take up negotiations with you.”

There is, in our opinion, no reason why such negotiations should not be entered into by your committee on the basis of the draft of ordinance submitted, if such draft meets with your approval.

(b) *Issuance of Certificates for Extensions and Further Equipment.*

It is provided in the draft of ordinance and form of mortgage deed of trust that in payment for extensions to, and any additional equipment for, the existing surface or elevated railways (which extensions and equipment are to be described in appropriate exhibits attached to the ordinance), such Municipal Railway Certificates may be issued. Such certificates are not to be issued until proper proof is made to the trustee of the expenditures so incurred, and until the title to such extensions or equipment has been conveyed to the trustee as part security for the certificates so issued, and until the trustee has been satisfied by the certificate

of the engineer of the City in charge of such work (or, if desired by the trustee, of an engineer designated by the trustee) as to the cost of such work or equipment.

(c) *Issuance of Certificates for Subways.*

So far as your committee shall determine that either the initial system of subways or additional subways are to be constructed through the issuance of Municipal Railway Certificates, provisions will be incorporated in the draft of ordinance submitted and the form of mortgage deed of trust which will safeguard the interests of the City in manner similar to that above outlined in connection with the issuance of certificates for the construction of extensions of the existing railways and the purchase of additional equipment.

(d) *Issuance of Certificates for Cash.*

Further provision is made in Article Three of the mortgage deed of trust under which certificates can be issued in the event that cash is deposited with the trustee; such cash to be expended under conditions and restrictions similar to those above outlined in connection with the issuance of certificates for the construction or acquisition of parts of the Municipal Railway System.

In view of the above safeguarding provisions, in our opinion, it is necessary, and cannot possibly result in harm to the City, to fix the amount of the authorized issue of certificates at an amount sure to be large enough to cover the acquisition of existing railway properties, the construction of extensions, the purchase of additional equipment and the construction of subways, in such manner and to such extent as to create an adequate Municipal Railway System capable of meeting the ever increasing demands of Chicago for a long period of years.

(e) *Possible Future Limitations.*

In addition to the limitations upon the issuance of certificates found in the mortgage deed of trust, further limi-

tations may be contained in such contracts as may be hereafter made with the City by parties taking said certificates either for the purchase price of their properties or for cash to be delivered to the City and used by it in the acquisition or construction of some part of its Municipal Railway System.

(3) FORM OF CERTIFICATE.

On March 16, 1922, your advisory committee of bankers, consisting of the president of the Harris Trust and Savings Bank, the vice-president of the Merchants Loan and Trust Company, and the vice-president of the First Trust and Savings Bank, presented the following written statement to your committee:

“After conferring with the committee’s attorneys regarding the municipal certificates proposed to be issued for the acquisition by the City of the traction properties, it is our opinion that provisions could be incorporated in the trust deed securing the certificates and in the ordinance under which they would be issued which, if approved by the courts* would make the certificates attractive and, if arrangements were made between the City, the traction companies and their security holders resulting in the exchange of such certificates for the traction properties, a market could be made for the certificates so exchanged as well as for such additional certificates as the City might hereafter from time to time find necessary to sell for future extensions and additions.

Albert W. Harris,
John A. Blunt, Jr.,
B. C. Hardenbrook.”

Manifestly it is necessary that the certificates should, as the bankers phrase it, be made “attractive to investors,” in order to raise the large sums of money needed for carrying out the physical plan above outlined and the acquisition and creation of an adequate Municipal Railway System. Un-

*As these bankers stated to your Committee, Court action is always required by them in connection with any large issue of new securities, especially in the case of securities issued as part of any settlement of the traction problem.

fortunately, owing to the absence from the City of some of the advisory committee of bankers, we have been unable as yet to take up with them in detail the provisions of the forms of certificate and of the mortgage deed of trust securing the same. These forms will, upon full consideration and examination by the bankers' committee, we believe, be found to comply with the requirements which they had in mind when they referred to the conditions which should be incorporated in the certificates and trust deed securing the same.

It is, of course, necessary to read the provisions of the proposed form of certificate in connection with the more elaborate provisions of the mortgage deed of trust, to which provisions the certificates are expressly made subject. The proposed form of certificate as set forth in the form of mortgage deed of trust is as follows:

UNITED STATES OF AMERICA.

STATE OF ILLINOIS

CITY OF CHICAGO.

Municipal Railway ..% Mortgage Gold Certificate

No. \$.....

KNOW ALL MEN BY THESE PRESENTS, That the City of Chicago, in the County of Cook and State of Illinois (hereinafter called the "City") for value received, promises to pay to bearer, but solely in the manner hereinafter set forth..... Dollars (\$.....) on the first day of, A. D. 19...., with interest thereon from the date hereof at the rate of..... per centum (....%) per annum, payable semi-annually on the first days of and in each year, on presentation and surrender of the annexed interest coupons as they severally become due. Both principal and interest of this certificate are payable in gold coin of the United States of the present standard of weight and fineness at the office of the....., Trustee, in the City of Chicago, Illinois.

The City hereby expressly agrees, pursuant to the terms of the statute in that behalf made and provided, that the charges or rates of fare fixed from time to time

for the service rendered by the Municipal Railway System, for the acquisition of which the certificates, including this certificate, described in the mortgage deed of trust hereinafter referred to, have been or may be issued, shall be enough to produce a revenue sufficient to bear all cost of maintenance and operation of such properties and to meet interest charges on all such certificates issued and outstanding, and to permit the accumulation of sinking funds that shall be sufficient to meet all such outstanding certificates at maturity respectively.

The holder hereof, by the acceptance of this certificate and as part of the consideration of the issue hereof, agrees that this certificate and said coupons, and all rights arising directly or indirectly out of or under the mortgage deed of trust securing the same, under no circumstances, shall be or become an obligation or liability of the City or payable out of any general fund thereof or out of the proceeds of any taxes levied under any law now or hereafter in force, and releases, and obligates himself not to assert or enforce, any such claim, and expressly agrees that this certificate and said coupons shall be payable solely out of the revenues or income to be derived from said Municipal Railway System.

If the City not less than thirty (30) days prior to the due date of any installment of interest on this certificate and on the other certificates then outstanding shall have failed to deposit with the.....

....., Trustee, in accordance with the provisions of said mortgage deed of trust, an amount equal to the total amount of interest due on such semi-annual interest date on such certificates, or if the City at any time shall fail to make the payments required under the terms of said mortgage deed of trust into the sinking funds for retiring the certificates as they respectively mature, then in either of such events, the Trustee, pursuant to the terms of said mortgage deed of trust, may institute from time to time any appropriate legal, equitable, or other proceeding for the purpose of enforcing such payments or either of them, as provided in said mortgage deed of trust, including *inter alia* the right to compel an increase of the charges or rates of fare for the service to be rendered by said municipal railway properties.

This certificate is one of a series designated "Series " of a duly authorized issue of

..... (.....) year public utility certificates known as Municipal Railway Certificates, the aggregate principal amount of the entire issue being limited to Million Dollars. The entire issue of such certificates issued and to be issued are and shall be equally and ratably, and without priority or preference, secured by a mortgage deed of trust dated the..... day of A. D. 192....., made by the City of Chicago to as Trustee, to which mortgage deed of trust reference is made for a description of the properties mortgaged, the nature and extent of the security, the rights of the holders of said certificates under the same, and the terms and conditions upon which said certificates are issued and secured. The entire issue of certificates shall be of like form, tenor and effect except that the certificates are issuable in successive series, which several series will vary as to date and time of maturity and may vary as to denomination, and except that the certificates within any series may vary as to denomination.

The holder hereof, by the acceptance of this certificate, hereby assents to all the provisions of said mortgage deed of trust, and this certificate is issued subject to all the terms of said mortgage deed of trust and with the same effect as if the same were herein fully set forth.

The Municipal Railway Certificates herein referred to are issued under authority of the Revised Statutes of the State of Illinois and of an ordinance of the City of Chicago duly passed by its City Council and approved by a majority of the electors voting thereon at an election held in said City on the..... day of A. D. 192..... It is hereby certified and recited that all acts, conditions and things required to be done precedent to and in the issuing of this certificate, have been done, happened, and been performed in regular and due form as required by law.

In case of certain defaults specified in said mortgage deed of trust, the principal of all the Municipal Railway Certificates secured thereby may become or be declared due and payable, in the manner and with the effect provided in said mortgage deed of trust.

This certificate shall pass by delivery unless registered as to principal in the name of the holder at the office of the City Comptroller in the City of Chicago, Illinois, such registry being noted hereon. After such registry no transfer hereof shall be valid unless made at said office by the registered holder, or his duly authorized attorney, and similarly noted on this certificate, but the same may be discharged from registry by being transferred to bearer, after which it shall again become transferable by delivery, and may again from time to time be registered or transferred to bearer as before. All coupons shall be payable to bearer, notwithstanding the registry of this certificate.

This certificate, at the option of the City, may be called for redemption at the office of said Trustee, in Chicago, Illinois, on any semi-annual interest payment day, but (except for sinking fund purposes) not beforeyears from the date hereof, upon and by the payment of the principal hereof, and all interest due hereon at the date of such redemption, ninety (90) days' notice of intention so to redeem having been given by publication as provided in said mortgage deed of trust.

Neither this certificate nor any of the coupons hereto attached shall be valid or become obligatory for any purpose until this certificate is authenticated by the signature of said Trustee to the Trustee's certificate endorsed hereon.

IN WITNESS WHEREOF, The City of Chicago, Illinois, has caused this certificate to be sealed with its Corporate Seal, signed by its Mayor, attested by its City Clerk and countersigned by its City Comptroller, and has caused the annexed interest coupons to be executed with the facsimile signatures of the said officers this..... day of 19.....

....., *Mayor.*

Countersigned:

....., *City Comptroller.*

Attest:

....., *City Clerk.*

(CORPORATE SEAL)

INTEREST COUPON.

Series

No. \$.....

On the day of, 19.....
 (unless the certificate hereinafter mentioned is called
 for redemption at an earlier date), the City of Chicago,
 Illinois, will pay to bearer at the office of.....
, Trustee, in
 Chicago, Illinois, upon presentation and surrender of
 this coupon Dollars
 (\$.....) in gold coin of the United States,
 being six months' interest due on that date on its Mu-
 nicipal Railway Certificate, Number.....
 This coupon is payable solely out of the revenues or in-
 come derived from the properties described in the mort-
 gage deed of trust securing said Municipal Railway Cer-
 tificate. The provisions of said certificate and mortgage
 deed of trust are made a part hereof.

.....
Mayor.

Countersigned:

.....
City Comptroller.

Attest:

.....
City Clerk.

TRUSTEE'S CERTIFICATE.

This certificate is one of an issue of City of Chi-
 cago Municipal Railway Certificates, of the series des-
 ignated therein, described in the Mortgage Deed of Trust
 within referred to, which mortgage deed of trust is re-
 corded in the office of the Recorder of Deeds of Cook
 County, Illinois, as Document No.

.....
Trustee.

By
*President.*

REGISTRATION.

Date of Registry.	In Whose Name Registered	City Comptroller of the City of Chicago
.....		
.....		
.....		
.....		

It is provided in the draft of ordinance submitted that certificates of the above form may be issued in successive series from time to time as may be required for the acquisition or construction of the several parts of the proposed Municipal Railway System.

Popular Purchase of Certificates Through City Wide Campaign.

It is also provided that the certificates belonging to each series may be issued in denominations of \$1,000, \$500, \$100 and \$50 each, so that such certificates may be offered for general subscription and may be purchased by the people in such amounts as they may have funds to invest. If, as is believed, these certificates will form a particularly attractive security, the people at large should have the opportunity to invest therein and their sale should not be limited to large banking and financial institutions. The more widely these certificates are placed among the people of Chicago, the better it will be for all concerned. If the car-riders have a direct financial interest as investors in the traction properties, they will feel an additional incentive to see that the properties are maintained and protected. A city-wide campaign for the placing of these certificates among the people would, we believe, produce results no less gratifying than those of the Liberty Bond campaigns.

The draft of ordinance submitted does not in any way attempt to fix the date of maturity of the certificates or

the length of time for which they shall run. Neither does it designate the rate of interest which the certificates shall bear. These are matters for the determination of the committee, and doubtless the advice of the advisory bankers will be sought and received in this connection. There is nothing in the Constitution or statutes of this State which limits the power of the City as to the date of maturity or the rate of interest to be named in these certificates.

(4) SPECIAL PROVISIONS PROTECTING CERTIFICATE HOLDERS
AND CITY.

Of the more important provisions incorporated in the forms of certificates and mortgage deed of trust for the protection of the holders of the certificates we call attention particularly to the following:

(a) The provision by which the City agrees that the rates of fare shall be enough to produce a revenue sufficient to bear all cost of maintenance and operation of the system, to meet interest charges and to permit the accumulation of the sinking funds to retire all the outstanding certificates at maturity;

(b) The provision that the City, not less than 30 days prior to the due date of any installment of interest on the certificates, shall deposit with the trustee an amount equal to the total amount of interest due on such semi-annual interest date;

(c) The provision requiring the City to establish a separate sinking fund for each series of certificates to be issued which shall be sufficient to retire each such series at its maturity; and

(d) The provision requiring the City to keep the system in repair and to maintain a depreciation, maintenance and renewal fund.

Referring to the above provisions in the order enumerated:

(a) Rates of Fare Just Enough to Meet Requirements.

The provision by which the City agrees that the rates of fare shall be enough to produce a revenue sufficient to bear all cost of maintenance and operation of the system, to meet the interest charges on all outstanding certificates, and to permit the accumulation of sinking funds to retire all such outstanding certificates at maturity, is in substantially the language of Section 12 of the Municipal Ownership Act of 1913. Said Section 12 reads as follows:

“The charges fixed for the service rendered by it by means of any such public utility by any city shall be high enough to produce a revenue sufficient to bear all cost of maintenance and operation and to meet interest charges on bonds and certificates issued on account thereof, and to permit the accumulation of a surplus or sinking fund that shall be sufficient to meet all outstanding bonds or certificates at maturity.”

The provisions of this section are mandatory. Such a provision is economically sound and in the interest of the public as well as in the interest of the investors who will advance the necessary funds to enable the City to acquire these public utility properties. That such municipally acquired public utility properties should be self-sustaining is not merely sound political economy but also an absolute condition precedent to the validity of their proposed acquisition, both under the statutes of this State and under the limitations contained in its present Constitution.

Proposed Article in New Constitution.

Indeed, the proposed article which has just been adopted by the Constitutional Convention for the enlargement of the borrowing powers of municipalities for the acquisition of public utilities is itself so limited as to require that such public utilities should be self-sustaining. We are of the opinion that the adoption of such an article in the new constitution would be in the public interest, but that, without such

an article and under the law and Constitution now in force, it is legal to issue public utility certificates of the character here proposed. In any event, it is clear that, even if Chicago should wait until a new constitution is finally submitted to and approved by the people of this State, the City would not be authorized to acquire any of its public utilities, including its local transportation system, unless such public utility was income producing and self-sustaining.

According to press reports, it has been decided by the Constitutional Convention to submit the proposed Constitution as a whole to a vote of the people. We are in no position to express an opinion as to whether or not the proposed Constitution so submitted will be adopted. If the City should wait until this new constitutional provision goes into effect and enabling legislation thereunder is passed, valuable time would be lost in working out the solution of the traction problem. Such solution would in any event, whether under the present Constitution or under the proposed article of the new Constitution, involve the formulation of a general program similar to that outlined in the ordinance submitted herewith, including the determination of the forms of the proposed certificates and mortgage deed of trust securing the same. It would also be necessary for the City Council to determine what use should be made of the traction fund and what subways, if any, should be built therewith. Therefore, it is clear that the work in which your committee is now engaged is necessary to any solution of the traction problem, whether the City and State are to continue under the present Constitution or shall adopt a new one.

Inviolable Contract—Enforceable in Court.

In our opinion the provision as to rates of fare in the certificates and mortgage deed of trust, as well as the other special provisions above referred to, would constitute a contract on the part of the City which would be inviolable and protected from interference by the legislature of the State under the Constitution of the United States. Un-

der the decisions of the Supreme Court of the United States it has been held that, while ordinarily contracts entered into by a municipality with reference to rates of fare or other charges by public utilities are subject to control and subsequent modification by the legislature or by a state commission created by it, such rates of fare and charges are not subject to such control or regulation when the legislature has delegated to the municipality the power to enter into a contract with reference to the maintenance of such rates of fare or charges, and the municipality, in pursuance of such grant of power, has in fact entered into such a contract. It is held by the Supreme Court of the United States in the decisions above referred to that this grant of power by the legislature to the municipality must be in "clear and unmistakable terms." It is our opinion that the Municipal Ownership Act of this State, and especially Section 12 thereof (and the corresponding provision of the earlier Mueller Act of 1903) did so grant to municipalities within the State in "clear and unmistakable terms" the power to enter into such contracts with respect to municipally owned utilities.

This Section 12, which speaks *in futuro* and is mandatory, evidently contemplates not only the initial fixing of rates of fare or charges which shall be sufficient to meet the several requirements above enumerated, but also that such rates of fare or charges shall at all times thereafter be maintained at a level sufficient to meet such requirements. The statute clearly contemplates that public utility certificates will be issued under its provisions which will not mature for a long period of time and, as elsewhere pointed out in this report, the statute contains no limitation upon the length of period for which such certificates may run. This section of the statute expressly provides that the rates of fare or charges shall be sufficient to provide, in addition to operating and maintenance costs, a sinking fund to retire these certificates at maturity, whenever that may be. Inasmuch as the statute in Section 9 thereof expressly authorizes that the mortgage deed of trust securing said certificates

“may contain such provisions and conditions not in conflict with the provisions of this act as may be deemed necessary to secure the payment of the public utility certificates described therein,”

the City of Chicago is thus authorized in “clear and unmistakable terms” to incorporate in the mortgage deed of trust and the certificates provisions which shall express and carry out the mandatory terms of Section 12 of the statute.

Our conclusion, therefore, is that an undertaking of this character incorporated in the certificate and mortgage deed of trust requiring the City to maintain rates of fare which shall meet the above requirements would be enforceable in appropriate proceedings in court for their specific performance. We shall hereafter refer to the provisions of the mortgage deed of trust defining more particularly the remedy accruing to the certificate holders and the trustee in the event that the City defaults in the performance of such undertaking.

As a matter of fact such a provision as that above referred to and incorporated in the draft of ordinance submitted affords the correct and only possible rule for the fixing of the rates of fare, and necessarily must result in the fixing of such rates at the lowest permissible figure, that is to say, at a figure which will provide for the cost of operation, the maintenance of the property and the payment of the principal and interest of the amounts representing the cost of acquisition. Such rule eliminates, as it should, all profits of such operation, and gives the people the desired service at cost.

It has been recognized both by the Supreme Court of this State and by the Supreme Court of the United States that the charges for service rendered by municipally owned public utilities are, in the language of our Supreme Court in the case of *Springfield Gas Co. v. Springfield*, 292 Ill. 236, 248,

“*simply to be high enough to produce revenue sufficient to bear all costs of maintenance and operation, to meet interest charges on bonds and certificates issued*

on account thereof, and to permit the accumulation of a surplus or sinking fund sufficient to meet all outstanding bonds or certificates at maturity, issued on account of such utilities. *The statute does not contemplate that the rate shall be higher or lower than for the purposes aforesaid*, no matter what effect such rates and charges may have upon other corporations or persons owning or operating public utilities." (Italics ours.)

Our Supreme Court, therefore, has interpreted the provisions above quoted of Section 12 of the Municipal Ownership Act so as to make it a *limitation* upon the rates of fare as well as a *requirement* that such rates of fare shall be sufficient for the purposes above set forth.

The court in that case further says (p. 248):

"The State has the right to prescribe rates and charges by private corporations and persons for the operation of public utilities that shall produce a reasonable profit or return over and above and on their entire investment and outlay, and, on the other hand, to *limit the rates and charges of utilities owned by municipalities so that they will only be sufficient to meet outlays and expenses of every kind by reason of their ownership and operation*, as provided by the Municipal Ownership Act. It is contemplated that private corporations and persons shall realize profits. The legislature had the right to assume that the rates and charges on each of these two classes of public utilities would not and could not be the same to consumers." (Italics ours.)

When the same case (*Springfield Gas & Electric Co. v. City of Springfield*, 42 Sup. Ct. Rep. 24, Advance Sheets December 1, 1921), came before the Supreme Court of the United States, that court, speaking through Mr. Justice Holmes, said:

"The private corporation whatever its public duties is organized for private ends and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object it is a gain to a public body and must be used for public ends. *Those who manage the work cannot lawfully make pri-*

vate profit their aim, as the plaintiff's directors not only may but must. The Supreme Court seems to interpret the Municipal Ownership Act (Laws 1913, p. 455) as *limiting* the charges allowed to what will be sufficient to meet outlays and expenses of every kind, thus emphasizing the purely public nature of the interests concerned and excluding the latitude for wrong that the plaintiff fears." (Italics ours.)

It is therefore clear that the rule prescribed for the fixing of rates of fare in the proposed draft of ordinance is not merely for the protection of the investors but is also for the protection of the car riders of Chicago.

Certainty of Income—Most Desirable Security.

The contract to maintain the rates of fare makes this certificate a most remarkable security. Authorities on railway finance have often pointed to the fallacy of the view that public utility bonds get their value from the physical property mortgaged therefor. In fact, such value depends upon the degree of *certainty of the income*. In his authoritative work on "Finance and Organization of Railroads," Professor William Z. Ripley states (p. 126):

"The real lien of a railway mortgage is not upon property as such, but upon earning power."

There is not a railroad bond in the United States as well secured as will be the certificates to be issued under the ordinance submitted, for there is not a railroad bond which is secured by any agreement on the part of the government that the rates of the issuing railroad shall always be maintained at a sufficient figure to enable the railroad to pay all its operating expenses, depreciation, interest on its bonds and to maintain a sinking fund sufficient to meet the bonds at maturity. A certificate, such as the Municipal Railway Certificates here proposed, secured by a lien upon the earnings of a Municipal Railway System (which earnings must be so maintained), is the highest type of security short of a general municipal bond, particularly where the system has

the exclusive right to serve the people of one of the great cities of the world.

(b) Deposit of Interest 30 Days in Advance.

The provision—that the City, not less than thirty days prior to the due date of any installment of interest on the certificates, shall deposit with the trustee an amount equal to the total amount of interest due on any such semi-annual interest date—will in similar manner, in our opinion, constitute a binding and inviolable contract on the part of the City which can be enforced in appropriate proceedings instituted for its specific performance. It is clearly desirable, and only right and proper, that the City, thirty days prior to the due date upon which the semi-annual interest payments become due, shall deposit with the trustee from the fund in which is kept the revenues and income of the Municipal Railway System an amount sufficient to meet such maturing interest. If the City fails in this regard, the certificate holders and the trustee will have the right, under the terms of the mortgage deed of trust, at once to institute proceedings. It is to be noted that such proceedings instituted for the specific performance of this and the several other special provisions above enumerated will not be in the nature of a foreclosure of the City's rights or in any way endanger them, but will be merely for the enforcement and performance of the several acts and things which the City undertakes.

This provision, therefore, like the other special provisions above referred to, is really quite as much for the protection of the City as it is for the protection of the investors. It is obviously to the interest of the people that no default shall be made in the payment of the interest on the Municipal Railway Certificates, and the provisions in this regard incorporated in the certificates and mortgage deed of trust afford a measure of protection in authorizing the immediate institution of court proceedings to prevent a default in the payment of interest and a consequent foreclosure of the mortgage deed of trust.

(c) Sinking Funds.

The provision requiring the City to establish a separate sinking fund for each series of certificates to be issued which shall be sufficient to retire each such series respectively at its maturity, in our opinion, will also form an inviolable contract on the part of the City, enforceable in appropriate court proceedings. Such a provision is in accord with the requirements of the Municipal Ownership Act above referred to, and in accord with the usual and necessary practice in mortgage deeds of trust securing the issuance of corporate bonds or similar evidences of indebtedness. Of course, investors would not buy, and the City should not be permitted to issue, securities for the ultimate payment of which the City did not, at the time of issue, make adequate provision; thus, for instance, under the Constitution of this State municipalities are required to provide in advance by taxation for the retirement at maturity of their general credit bonds.

It is much more desirable that a separate sinking fund should be created for each series of certificates than that one common sinking fund should be provided for all of the certificates issued irrespective of series. These different series, as above pointed out, will mature on different dates, and it is therefore desirable, if not absolutely necessary, that the particular fund which is to be used for the retirement at maturity of each series should be kept distinct from the other funds so provided for the retirement of the other series.

It is provided that all of the several sinking funds shall be held by the trustee and invested by it from time to time in certificates of the several series for which said sinking funds are respectively held, by purchase, through public advertisement, at the market price, but not to exceed par and accrued interest, or by redemption by lot at par and accrued interest. The certificates so acquired for the sinking funds are to be kept alive in the hands of the trustee, marked "non-negotiable" and treated at all times as "outstanding" certificates under the provisions of the mort-

gage deed of trust, until all of the certificates of that particular series are paid off and cancelled. Such a provision has several advantages. In the first place, by this procedure the moneys held in the sinking funds will be drawing a higher rate of interest (the rate payable on the certificates) than would be possible if the funds were left uninvested. In the next place, the purchase or redemption of certificates from time to time for sinking fund purposes, as rapidly as funds accumulate in the hands of the trustee, at not to exceed par and accrued interest, will stabilize the market for these certificates.

The form of mortgage deed of trust does not specify the amounts to be paid from time to time into the several sinking funds. It simply provides that "semi-annually commencing as to each such sinking fund..... months after the date of the certificates in the series for which such sinking fund was constituted, on account of each series of such certificates respectively in gold coin of the United States of the present standard of weight and fineness, a sum equal to.....per centum (.....%) of the face amount of all such certificates then outstanding of each of said series respectively" shall be paid by the City to the trustee.

*Illustration—Saving of Profits Now Taken by Companies
Sufficient to Pay for Surface Lines.*

In order to arrive at an estimate as to how large an amount must be so paid semi-annually we have had a calculation made by a competent authority in such matters. Such a calculation is, of course, possible only if we assume, for the purpose of illustration, some definite rate of interest which the certificates will bear, the rate of interest which will be paid by the trustee on any uninvested balances in the sinking funds from time to time (such balances being uninvested for very short periods only), and some definite length of term for which the certificates should run.

For the purpose of this illustration, and without in any way expressing any opinion as to the propriety of the figures taken, it was assumed that the certificates will bear interest at the rate of five per centum (5%) payable semi-annually; that the trustee will pay interest at the rate of three per centum (3%), payable semi-annually, on the uninvested balance in its hands from time to time, and that the certificates will run for a period of thirty (30) years. On such assumptions it appears, according to the calculations made for us, that the City would be required to pay semi-annually into each of the several sinking funds approximately $\frac{3}{4}$ of 1% of the aggregate face amount of the certificates then outstanding belonging to such series. The aggregate total requirements annually for the sinking funds would therefore be approximately $1\frac{1}{2}\%$ of the aggregate face amount of the certificates then outstanding belonging to all the different series. Such $1\frac{1}{2}\%$ for sinking funds added to 5% for interest (as above assumed) makes a total annual carrying charge of $6\frac{1}{2}\%$ on the aggregate face amount of all the certificates then outstanding.*

That a large saving would accrue to the car riders, if the acquisition of the Surface Lines were so financed, over what is paid by the car riders under existing private ownership, is obvious from the following calculation:

The earnings of the Surface Lines for the fiscal year ended January 31, 1922, were as follows:

*By assuming for the above illustration 5 per cent as the interest rate on the certificates we do not in any way express the view that it will be necessary to pay as high a rate of interest.

CHICAGO SURFACE LINES.

Earnings and Expenses for the Fiscal Year Ended
January 31, 1922.

Earnings:

Passenger Cars	\$59,706,412.72
Other	637,320.47

Gross Earnings	\$60,343,733.19
----------------------	-----------------

Expenses:

Way and Structures and Equipment...	7,389,312.31
Renewals	4,827,498.67
Power	3,449,167.84
Conducting Transportation	24,783,302.81
Damages, General and Miscellaneous...	3,873,868.55
Taxes	2,193,000.00

Total Operating Expenses.....	46,516,150.18
-------------------------------	---------------

Residue Receipts	13,827,583.01
------------------------	---------------

Less: Joint Account Expenses.....	449,000.00
-----------------------------------	------------

	13,378,583.01*
--	----------------

5% Interest on "Capital Account".....	8,024,104.18
---------------------------------------	--------------

Divisible Net Receipts.....	5,354,478.83
-----------------------------	--------------

Companies' 45%	2,409,515.48
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City's 55%	2,944,963.35
------------------	--------------

Companies 5% on "Capital Account"

and 45% of Divisible Net Receipts...	10,433,619.66
--------------------------------------	---------------

Making a return to the companies on

their "Capital Account" of.....	6.501%
---------------------------------	--------

From this statement it appears that last year the Surface Lines collected from the car-riders a sum sufficient (after paying all operating costs, taxes and depreciation, and renewal charges) to yield net earnings of \$13,378,583.01. This was approximately 8.36% on the "Capital Account" of approximately \$160,000,000. Consequently, even if the City

*This is a net return (over and above operating expenses, taxes, depreciation and maintenance) of approximately 8.36 per cent on the "Capital Account" of approximately \$160,000,000.

were to acquire the Surface Lines through the issuance of certificates in face amount equal to the "Capital Account," and were to pay as high as five per cent interest on its certificates, and such certificates were to mature as early as 30 years, still there would be a saving to the car-riders of the difference between $6\frac{1}{2}\%$ (required to pay the interest charges on the certificates and to retire the certificates at maturity), and the 8.36% which was earned net last year and paid by the car-riders. This would be a saving of 1.86%. Expressed in terms of money, the $6\frac{1}{2}\%$ on the above assumption would be \$10,400,000, so that the saving to the car-riders would be the difference between \$10,400,000 and \$13,378,000, or \$2,978,000.

Referring to the above table, it will be noted that the City's 55% of the divisible net receipts under the 1907 ordinances amounted last year to approximately \$2,945,000. That amount would more than offset the sinking fund requirements which, under the assumed figures, on the basis of \$160,000,000, would be \$2,400,000.

Under the 1907 ordinances there was paid to the companies last year as their 45% of the divisible net receipts \$2,410,000. If that profit of the companies were saved to the car-riders, it would be sufficient to take care of the full sinking fund requirements, assuming that the plan here proposed were put into effect on the basis of the figures used for illustration.

Assuming—but only for the sake of another illustration—that the City were to acquire the Surface Lines through the issuance of \$140,000,000 of certificates, (instead of the \$160,000,000—the "Capital Account"), the assumed annual interest and sinking fund requirements of $6\frac{1}{2}\%$ would be \$9,100,000, as against the \$13,378,000 of net earnings collected from the car-riders last year. On these figures there would be a saving to the car-riders of about \$4,300,000. Of course, such savings would be reflected in reductions of fares.

Moreover, at the maturity of the certificates, the 6½% charge on the original cost, for interest and sinking fund requirements, would cease, inasmuch as the indebtedness represented by the certificates would then be paid off, through the accumulations in the Sinking Funds, and the City would own the properties so acquired free from the debt incurred for such original cost.

(In taking the figures of \$160,000,000 and \$140,000,000, it must be distinctly understood that we are using these figures merely by way of illustration and not as in any way indicating the correct valuations of the Surface Lines.)

(d) Depreciation, Maintenance and Renewal Fund.

The provision requiring the City to keep the Municipal Railway System in repair and to maintain a Depreciation, Maintenance and Renewal Fund is likewise a provision quite as much in the interest of the City and the car-riders as it is in the interest of the investors who buy the certificates. It, of course, would be a suicidal policy for the City not to maintain the system in good repair and adequate to meet the needs of the car-riders for up-to-date and efficient transportation. It is the practice of all well-regulated public utilities, as well as other business enterprises, to maintain adequate depreciation, maintenance and renewal funds in order to keep the plant at all times in proper repair and to offset accruing depreciation, obsolescence and inadequacy. The Municipal Ownership Act wisely provides that the City owning such utility shall so maintain its property.

We have attempted no calculation as to what amount or percentage should be paid into such fund, as this is a matter for your committee to decide and upon which you will doubtless desire the advice of experts on the subject. In this connection, we might call attention to the fact that the 1907 ordinances provide for the payment each year (after the expiration of the three-year period of immediate rehabilitation) into a fund for maintenance and repairs of a sum equal to at least 6% of the gross receipts for the particular

year and for the payment each year into the renewal fund of a sum equal to 8% of such gross receipts. Those ordinances contained special provisions as to maintenance and as to the expenditure of such funds. Somewhat similar provisions were incorporated in the proposed 1918 Traction Ordinance. It seems to us unnecessary, and perhaps inadvisable, to separate the two funds, and accordingly the draft submitted provides for only one fund to take care of all repairs, maintenance and depreciation. This also is a matter upon which your committee will doubtless secure the advice of engineering, accounting and operating experts.

Another question upon which such experts might well be consulted is whether the method of computing the amounts to be paid into such fund should be on the basis which we have employed in the draft of ordinance of taking a percentage of the gross revenues or of a percentage of the value of the properties acquired and owned.

(5) ENFORCEMENT OF PROTECTIVE PROVISIONS.

(a) *Immediate and Simple Remedy.*

The four special provisions above referred to will be, as we have already stated, in our opinion enforceable by appropriate proceedings in court. Section 3 of Article Nine of the mortgage deed of trust provides:

“If and whenever the City shall have failed to comply with”

any of such provisions,

“then in either of such events the City expressly consents and agrees that the Trustee may, and upon the request of the holder or holders of a majority in amount of the Municipal Railway Certificates then outstanding and if indemnified to its reasonable satisfaction shall, institute any appropriate legal, equitable or other proceeding for the purpose of specifically enforcing such payments or any or either of them, including *inter alia* any appropriate legal, equitable or other proceeding to compel an increase of the charges of rates of fare for

the service rendered by said Municipal Railway System."

A precedent for such legal proceeding (under facts in this respect similar to, but in some other respects differing from, those involved under the proposed ordinance) is found in the case of *Puget Sound Power & Light Company v. City of Seattle*, 271 Fed. 958 (decided by the United States District Court for the Western District of Washington, Northern Division, April 23, 1921). In that case it was held that equity can specifically enforce the provisions in a contract whereby a city obligated itself to pay, from the gross revenues of its street railway system, a sufficient amount to meet an installment of interest into a special fund for that purpose one month before payment was due, and that such enforcement did not interfere with the governmental activities of the city.

Such proceeding would not necessitate any elaborate proof, inasmuch as the amounts (payment of which by the City would be enforced thereby) would be susceptible of exact and ready calculation under the terms of the special provisions above referred to.

(b) *Foreclosure After 12 Months.*

The provisions for the foreclosure of the mortgage deed of trust are contained in Article Nine. It is there provided that, if the City shall default in the payment of the principal or interest as they mature respectively on the Municipal Railway Certificates, or in the performance or observance of any of the covenants, conditions and agreements contained in the mortgage deed of trust, and such default shall have continued for a period of twelve months after written notice thereof has been given to the Mayor and City Comptroller by the Trustee,

"then in every such case the Trustee may, and upon the written request of the holder or holders of a majority in amount of the Municipal Railway Certificates issued and then outstanding shall, declare the whole of the principal of all such certificates issued and then out-

standing to be at once due and payable, anything in this Indenture or in said certificates to the contrary notwithstanding."

The article then goes on to provide that if and whenever, but not before, the whole of the principal of all such Municipal Railway Certificates then outstanding shall become due and payable, either by their terms or by such declaration so accelerating the maturity thereof, the Trustee may, and upon proper request by the holders of a majority in amount of the certificates shall, enter upon and take possession of the mortgaged property, or cause said mortgage deed of trust to be foreclosed and the mortgaged property or any part or parts thereof, to be sold, and shall be entitled, as of right, to the appointment of a receiver of the mortgaged property, or any part thereof.

The provision postponing all rights of foreclosure until twelve (12) months after notice of default has been given to the Mayor or City Comptroller is taken substantially from the Municipal Ownership Act of 1913, Section 9, and affords ample protection against any possible hasty action on the part of the Trustee or the certificate holders looking to the foreclosure of the mortgage deed of trust. It is eminently desirable from the standpoint of both the City and the investors that no such action should be hastily taken, for it would inevitably result in depreciating the market value of all the outstanding certificates and would seriously injure the credit of the municipality.

The special remedy, above mentioned, by way of specific performance for the enforcement of the City's agreements to maintain the rates of fare, to deposit the amount of the interest 30 days before its due date, and to make payments into the sinking and depreciation funds, immediately upon any failure by the City to comply with any of such requirements, renders it extremely improbable that any default by the City under the terms of the mortgage deed of trust will ever continue for a period of twelve months. Such special remedy, therefore, virtually insures that no foreclosure will ever take place.

It is provided in the mortgage deed of trust that all rights of foreclosure are vested in the Trustee, and the Trustee can be forced to institute proceedings only upon the request of a majority in amount of the holders of the outstanding certificates and upon being properly indemnified. The form of mortgage deed of trust further contains provisions for the waiver of default even after a declaration has been made of the maturity of said certificates.

No Grant of Franchise.

It is provided (Article Nine, Section 7) that no grant of a franchise, privilege or right to maintain or operate any part of the mortgaged property shall be held to have been made by the City in issuing the Municipal Railway Certificates or executing the mortgage deed of trust. This provision is of special importance in view of the decision of our Supreme Court in the *Lobdell* case above referred to, wherein it was held that the Mueller Act certificates then before the court were invalid because they involved a grant of a twenty (20) year franchise to the purchasers of the mortgaged property at the foreclosure sale. Any possibility of such a holding by the courts with reference to the form of certificate and mortgage deed of trust here submitted is precluded by the section above referred to.

(6) REDEMPTION AND RETIREMENT OF CERTIFICATES.

In addition to the provisions above mentioned with reference to the redemption of these certificates from time to time through their acquisition in the Sinking Funds, the mortgage deed of trust provides (Article Six) that at any time after.....years from the date of their issue, respectively, any of the series may be redeemed at par and accrued interest, funds therefor having been deposited by the City. Such redemption may be partial as to each and every series, and notice of the election of the City to redeem all or any of such certificates shall be given by publication in a daily newspaper of general circulation, published in the

City of New York and in a daily newspaper of general circulation published in the City of Chicago at least once in each calendar week for six successive weeks. In the event that less than all of the outstanding certificates of any particular series are to be redeemed, the Trustee shall draw by lot, in such manner as it shall determine, from the serial numbers of all the outstanding certificates of such series, the numbers of an amount of certificates substantially equal to the principal amount specified and after such publication of the notice of the numbers of the certificates so to be redeemed has been made, interest on those particular certificates shall cease to accrue.

The provisions contained in the mortgage deed of trust for the redemption of the certificates will enable the City whenever it has funds applicable thereto, or can obtain the same at lower rates of interest than that which the certificates bear, to pay off all, or such as it can, of the outstanding certificates.

(7) PARTIAL RELEASES.

The mortgage deed of trust contains in Article Eight appropriate provisions for the execution of partial releases from time to time of properties then constituting part of the Municipal Railway System, which may be unnecessary in connection therewith. This provision will enable the City to withdraw from the lien of the mortgage deed of trust and to sell any power plants, car barns or other property which it may acquire in the purchase or condemnation of the surface or elevated railway properties and may find unnecessary for, or ill adapted to, the Municipal Railway System. Proper provision is contained in the above mentioned Article requiring that all funds paid to the Trustee for such partial releases shall be held by it as part of the mortgaged property until paid out on proper vouchers for the payment of the reasonable cost of the replacement of part or all of the property so released or until paid by the Trustee into the Depreciation, Maintenance and Renewal Fund on the order of the City Comptroller.

(8) OBLIGATIONS OF CITY LIMITED TO PROPERTIES AND REVENUES THEREOF.

As above pointed out, the Municipal Ownership Act of 1913 (as well as the earlier Mueller Act of 1903) specifically provides that any public utility certificates issued thereunder shall not, under any circumstances, be or become an obligation or liability of the City or payable out of any general fund thereof, but shall be payable solely out of the revenues or income to be derived from the public utility properties acquired through the issuance of such certificates, and under the doctrine of the *Lobdell* case the certificates can be secured solely by a lien on the property so acquired.

Accordingly, the forms of certificate and mortgage deed of trust contain appropriate provisions for carrying out these limitations found in the statute. The form of certificate expressly provides as follows:

“The holder hereof, by the acceptance of this certificate and as part of the consideration of the issue hereof, agrees that this certificate and said coupons, and all rights arising directly or indirectly out of or under the mortgage deed of trust securing the same, under no circumstances, shall be or become an obligation or liability of the City or payable out of any general fund thereof or out of the proceeds of any taxes levied under any law now or hereafter in force, and releases, and obligates himself not to assert or enforce, any such claim, and expressly agrees that this certificate and said coupons shall be payable solely out of the revenues or income to be derived from said Municipal Railway System.”

The mortgage deed of trust contains even more elaborate provisions to the same effect, and it is therein provided (Article Three) that neither said certificates nor said mortgage deed of trust nor the ordinance authorizing the same nor any other ordinance that may hereafter be passed authorizing the acquisition of all or any of the municipal railway properties or the issuance of Municipal Railway Certificates shall, under any circumstances, create or become an obligation or

liability of the City, etc., substantially as above provided in the language quoted from the certificate.

No Possible Resort to Taxation.

It is to be noted that the holders of the certificates expressly obligate themselves not to assert or enforce any claim against funds raised by taxation under any law now or hereafter in force. The rights of the City growing out of this obligation assumed by the holders of certificates, in our opinion, would be protected by the provisions of Section 23 of Article IV of the Illinois Constitution:

“The general assembly shall have no power to release or extinguish, in whole or in part, the indebtedness, liability, or obligation of any corporation or individual to this state or to any municipal corporation therein.” (Italics ours.)

As further protection to the City it is provided in Section 7 of the ordinance that,

“Every obligation made or issued by or on behalf of the City of Chicago with respect to said Municipal Railway System shall contain, expressly or by reference, in substance and effect, the limitations”

above set forth with reference to the liability of the City.

It is also provided in Section 15 of the ordinance that all the revenues and income derived from the Municipal Railway System shall be kept by the City Treasurer in a special fund distinct and separate from all other funds of the City and be deposited in the regular depositories of the City under the general laws and ordinances, as near as may be applicable thereto, and that all payments out of said special fund shall be made in accordance with the provisions of the mortgage deed of trust and, subject thereto, as directed from time to time by the City Council. All payments provided for in the mortgage deed of trust and the ordinance shall be made exclusively out of the revenues and income of said Municipal Railway System.

Distinction from Mueller Act Certificates Previously Held Invalid.

The above and foregoing provisions will preclude the possibility of any of the obligations contained in the certificates or mortgage deed of trust or growing out of the ownership of the system, now or hereafter incurred, being held to be a general liability of the City or payable out of any of its funds other than those derived as revenues and income of the Municipal Railway System. It was necessary to safeguard, in the manner above indicated, the general funds of the City and to preclude beyond all possibility any assumption that such funds could be made liable for any indebtedness in connection with said Municipal Railway System, in order to avoid the danger indicated by the decision of the Supreme Court in the *Lobdell* case. That case decided, as above pointed out, that any public utility certificate which was a charge upon any asset of the City acquired by any means other than through the issuance of such certificates would constitute an indebtedness of the municipality and therefore come within the terms of the constitutional limitations upon the debt incurring power of the City.

Certificates a First Mortgage Lien.

These certificates and the mortgage deed of trust will create, therefore, a lien confined exclusively to the Municipal Railway System so to be acquired. This lien will, according to the express terms of the certificate and the mortgage deed of trust, be a first mortgage lien, and the City covenants that it will not permit any prior lien upon said Municipal Railway System or any part thereof to be created, nor will it permit the value of the security to be imperiled or diminished.

The plan proposed, therefore, calls for the acquisition of the existing surface and elevated railway properties free and clear of all liens and encumbrances. If such acquisition is by negotiation and purchase, provision would have to be made for the retirement of the outstanding bonds and

other securities of the existing companies prior to the vesting of title in the City and the placing of such title in the Trustee subject to the terms of the mortgage deed of trust. In the same way, if such acquisition is by condemnation proceedings, provision would have to be made for the acquisition in such proceedings of the interests of all the parties holding any of the outstanding securities of such existing companies. In any event, it would be incumbent upon the City to see that before these certificates were issued, the properties securing the same were free and clear of incumbrance. Such a plan is doubtless desirable for the protection of both the investors and the City, and in the view of some members of the bar would be absolutely necessary in order to render these certificates valid. We are not at present prepared to admit that this is the effect of certain of the decisions of the Supreme Court of this State, but it is the view entertained by some, and it would be wise to avoid such possible legal complication in the manner above pointed out.

(9) ACCOUNTS AND REPORTS OF MUNICIPAL RAILWAY SYSTEM.

The mortgage deed of trust (Article Five) contains a special provision, taken in substance from the Municipal Ownership Act, requiring the keeping of the accounts of the Municipal Railway System distinct from other City accounts, and in such manner as to show the true and complete financial results of such city ownership (or of ownership and operation, if and when such operation shall be authorized and undertaken). Such accounts must show the actual cost to the City of said Municipal Railway System, all costs of maintenance, extensions and improvements, all operating expenses of every description in case of such city operation, the amount set aside for sinking fund purposes, the allowances for interest, depreciation and insurance as in the mortgage deed of trust provided, and estimates of the amount of taxes that would be chargeable against said system if owned by a private corporation, together with such other items as will disclose the financial results of municipal own-

ership (and municipal operation, if and when such operation shall be authorized and undertaken).

It is further provided that the City Council shall cause to be printed annually for public distribution a report showing the financial results of such city ownership (or ownership and operation, if and when such operation is authorized and undertaken), and that the accounts of the system shall be examined once each year by an expert accountant who shall report to the City Council and to the Trustee the results of his examination, which expert accountant, it is agreed, shall be satisfactory to the Trustee.

It is also provided that the City shall furnish to the Trustee each month statements and balance sheets showing the earnings, expenses and financial condition of the system, shall permit the Trustee or its auditors or agents to inspect the books, documents and accounts of the system, and shall furnish to the Trustee from time to time a statement of any construction work being carried on by or for the City with such information as to the amounts expended or to be expended in and about the same as the Trustee may reasonably request.

The desirability of such provisions for the keeping of full and detailed accounts of the Municipal Railway System and for submitting such information in reports to the public and to the Trustee representing investors is clear. By and through such accounts and reports the public as well as investors will be able to judge intelligently the results of municipal ownership.

(10) FURTHER PROVISIONS OF THE MORTGAGE DEED OF TRUST.

In addition to the special provisions above referred to, the mortgage deed of trust contains clauses dealing with many matters to which specific reference need not be here made. These clauses, for the most part, are such as are customarily found in documents of a similar character securing bonds issued by public utility corporations, changed, so far as necessary, to make them appropriate to the issue

by a municipality of public utility certificates. Among such usual provisions are those requiring that the insurable properties belonging to the system be kept by the City insured at the reasonable insurable value thereof under policies payable to the Trustee as its interest may appear, and that any insurance money paid to the Trustee in case of loss shall be paid out under proper safeguards for the replacement of the property lost or destroyed or be, upon order of the City Council, paid into the Depreciation, Maintenance and Renewal Fund.

Trustee's Qualifications.

The mortgage deed of trust also contains usual and customary provisions concerning the duties and liabilities of the Trustee, and for the appointment of a successor to the original Trustee in case the Trustee first selected shall resign or be removed or otherwise become incapable of acting. It is provided in the draft of ordinance submitted (Section 9) that immediately after its adoption by a vote of the people the City Council shall select some corporation theretofore created and then existing under the laws of the State of Illinois and authorized by law to accept and execute trusts, having its principal office in the City of Chicago, and having a capital and surplus aggregating at least..... Million Dollars (\$.) to act as Trustee under the aforesaid mortgage deed of trust, and the same conditions are made as to the qualifications of any successor thereafter to be selected, which successor may, under the terms of the mortgage deed of trust, be appointed, with the consent of the City Council, by the holders of a majority in amount of the Municipal Railway Certificates then outstanding.

III. OPERATION OF THE MUNICIPAL RAILWAY SYSTEM.

It is expressly provided in Section 16 of the draft of ordinance submitted that,

“Nothing in this ordinance contained shall be construed or held to determine the form of operation,

whether by the City of Chicago or otherwise, of all or any of the municipal railway properties to be acquired pursuant to the provisions hereof. The City itself shall not proceed to operate all or any part of the municipal railway properties acquired under the provisions of this ordinance until and unless the proposition so to operate shall have first been submitted to the electors of the City as a separate proposition and approved by the electors as provided by law, nor shall the City lease for railway operation all or any part of said municipal railway properties until and unless an ordinance authorizing such a lease shall have first been submitted to the electors of the City and approved by a majority of those voting thereon.

The above provisions concerning operation are taken substantially from the Municipal Ownership Act of 1913 which specifically declares in Section 4,

“No city shall itself proceed to operate any such public utility for the use or benefit of private consumers or users, for hire or charge for such consumption or use, *unless the proposition to operate shall first have been submitted to the electors of the city as a separate proposition and approved by a majority of those voting thereon.*” (Italics ours.)

A similar provision is found in Section 1 of the earlier Mueller Act of 1903 except that it is therein provided that the proposition to operate must

“first have been submitted to the electors of such city as a separate proposition and approved by *three-fifths* of those voting thereon”

in contrast with the *majority* vote required under the above quoted provision of the Municipal Ownership Act. In view of this express declaration in the statutes of this State, it would be legally objectionable to incorporate in the proposed draft of ordinance any provision which contemplated any form of municipal operation under either the direction of the City Council itself or any board or official created or designated by it.

Mr. Gore stated to your committee, that one of the conclusions of the All-Chicago Council was

“That the lines be the property of the municipality, but operated, controlled and supervised by a regulatory body composed of representatives of all parties in interest; the public, the employees, the municipality and the investors.”

Somewhat similar suggestions with regard to the operation of the system to be owned by the City have been made by others in past discussions of the problem before your committee and your predecessors. Such a board of operation would or might be regarded by the courts as representing a phase of municipal operation and therefore as coming within the above provisions of the Municipal Ownership and Mueller Acts.

We, therefore, are of the opinion that it is not safe to incorporate in the present proposed ordinance any provision whatsoever with reference to the operation of the properties. After the passage of this proposed ordinance, which, as above pointed out, only vests in the City the *power to acquire* a Municipal Railway System, there will be ample time and opportunity to work out the details concerning operation and submit the same to a popular vote before any properties can be acquired or constructed and be ready for operation either by the City or through such agency or lessee as the City may designate.

If negotiations for the purchase of any of the existing railway properties be successfully concluded prior to the referendum on the ordinance herewith submitted, the contract and ordinance for such purchase could properly be submitted to a vote at the same election and could be accompanied by an ordinance, also then to be submitted to a separate vote, providing for the method of operation.

Referendum on All Leases.

The last clause quoted above from Section 16 of the proposed ordinance with reference to the leasing of all or any part of the Municipal Railway properties and providing that no such lease shall be executed until and unless an ordi-

nance authorizing such a lease shall have first been submitted to the electors of the City and approved by the necessary number of those voting thereon, complies with the requirements of the Municipal Ownership Act and the Mueller Act, but at the same time is more restrictive than the provisions therein contained. That is to say, those acts are not *mandatory* with reference to the taking of a referendum vote upon any lease, but such referendum vote is *optional* with the people and is to be taken in the event that a petition signed by a certain percentage of the qualified electors shall have been filed asking that the ordinance authorizing a lease be submitted to the voters. Moreover, these acts apply only to leases for a period longer than five (5) years, while the clause above quoted from Section 16 of the proposed ordinance covers all leases for whatsoever period of time, and requires that all leases shall be submitted to a vote of the people.

It is, of course, a matter of policy for your committee to determine whether or not it is wise to incorporate in the proposed ordinance such a provision which is more restrictive than the statutes. It seems to us that it might be considered objectionable to leave the way open to the granting, without a referendum, of leases for any period less than five (5) years, say for instance four and one-half ($4\frac{1}{2}$) years and subsequent renewals thereof for successive like periods.

If, after acquiring the ownership of its Municipal Railway System, the City should lease it or any part thereof, the rentals paid to the City under such leases would constitute revenues and income of the Municipal Railway System and be applicable under the terms of the mortgage deed of trust to the various purposes therein set forth.

*Possibility of Constructing Extensions by Special
Assessment.*

We have given careful consideration to the suggestion often made, that subways and extensions of the surface and elevated railways may be paid for through the levying of

special assessments on properties specially benefited. We have reached the conclusion that, while such method of financing local extensions may be legally possible, it is unwise to incorporate, in any ordinance of the character here submitted, any provision with reference thereto. As already pointed out, the proposed ordinance has to do exclusively with the acquisition of a Municipal Railway System through the issuance of public utility certificates, and because of the conditions and limitations imposed by statute upon the power of the City to issue such certificates we do not regard it feasible to combine in the same ordinance provisions for the issuance of such certificates and provisions for the levying of special assessments on property specially benefited.

In our opinion, there is also serious doubt as to whether an Initial System of Subways such as that described in the Engineers' Report and in the alternative drafts of ordinance heretofore submitted by us to your committee could properly be termed a "local improvement" in such sense as to authorize the levying of special assessments for the construction thereof. Recent decisions of the Supreme Court of this State have laid down strict rules as to what can be held to be a "local improvement." However, this is a matter for further study and consideration, and the plan here outlined and the provisions of the ordinance herewith submitted are in no way inconsistent with, nor would they in any way preclude, the subsequent levying of special assessments upon property specially benefited by any part of the Municipal Railway System which the Council shall decide should be constructed through funds so raised.

Under the doctrine of the *Lobdell* case, however, as above stated, it is clear that public utility certificates cannot create a lien upon any asset of the City acquired through means other than the issuance of such certificates, and therefore such certificates could not be made a lien on any property acquired or constructed through the levying of special assessments. It follows from this that any property so acquired or constructed should not be placed under the mortgage deed of trust.

SUMMARY OF RECOMMENDATIONS.

1. That the draft of the proposed ordinance submitted herewith (which, for the purpose of distinguishing it from the alternative drafts of Subway Ordinance heretofore submitted, is here designated the "Comprehensive Ordinance"), after consideration by your Committee and modification in so far as necessary to meet your wishes, shall be completed by the insertion therein of the following:
 - (a) A description in Exhibits "A" and "C" of all of the existing surface and elevated railway properties respectively which your Committee decides to acquire through the issuance of Municipal Railway Certificates;
 - (b) A description in Exhibits "B" and "D" of all of the extensions of, and additional equipment for, the surface and elevated railway properties respectively which your Committee decides to construct or acquire through the issuance of such Certificates;
 - (c) A description in appropriate exhibits of such subways as your Committee decides to construct or acquire through the issuance of such Certificates;
 - (d) The aggregate amount of such Certificates which your Committee shall decide the City should be authorized to issue under the provisions of the ordinance and pursuant to the terms of the mortgage deed of trust;
 - (e) The length of term for which such Certificates should run and the rate of interest they should bear;
 - (f) The amounts to be paid by the City semi-annually into the several Sinking Funds established for the purpose of retiring the several series of Certificates at their maturities respectively;

- (g) The rate of interest to be paid by the Trustee on uninvested moneys held by it in the several Sinking Funds;
 - (h) The amounts to be paid monthly into the Depreciation, Maintenance and Renewal Fund; and
 - (i) The number of years to elapse after issuance before Certificates are subject to redemption for cancellation.
2. The determination by your Committee of the question whether the "Traction Fund" should be used for the construction of an Initial System of Subways, and if your Committee so decides, then the determination of what subways shall be so constructed and along what routes.
 3. The redrafting of the Subway Ordinance in accordance with such determination and instructions as your Committee may give to the engineers and attorneys.
 4. After the approval by your Committee and the Local Transportation Committee of such proposed Comprehensive Ordinance and Subway Ordinance, with such modifications and changes and in such forms as may be determined, their submission to and passage by the City Council.
 5. The contemporaneous submission of such ordinances so passed to the electors of the City for their approval at the earliest possible election.
 6. The selection thereafter by the City Council of some duly qualified Trust Company or Bank to act as Trustee under the mortgage deed of trust set forth in the Comprehensive Ordinance and the determination of its compensation.
 7. The execution by the City and the Trustee and the recording of the mortgage deed of trust for the purpose of securing the Municipal Railway Certificates.
 8. The preparation of such Certificates and their delivery to the City Comptroller to be held by him for subsequent authentication and issue.

9. The City shall then

- (a) Acquire, by purchase or condemnation or both, the existing surface and elevated railway properties; and
- (b) Construct extensions and purchase additional equipment designated in the Comprehensive Ordinance to be immediately constructed and purchased. [Remaining extensions and equipment to be subsequently constructed and purchased respectively, as designated in the Comprehensive Ordinance].

10. The construction, by the use of the Traction Fund, of an Initial System of Subways, if the City Council shall have passed and the people shall have approved, a Subway Ordinance authorizing such use.

11. The construction of Additional Subways to be built as parts of the Municipal Railway System through the issuance of Municipal Railway Certificates.

12. The City Council will then be in a position to decide

- (a) how the Municipal Railway System, and
 - (b) how the Initial System of Subways
- are to be operated, whether by the City itself, or by some lessee. An appropriate ordinance providing for operation can then be passed and submitted to the people for their approval.

Respectfully submitted,

STEPHEN A. FOSTER,

WM. H. SEXTON,

JEROME N. FRANK,

Counsel for the Committee.

Power of City to Purchase Capital Stock in Elevated Railways.

September 18, 1923.

HON. U. S. SCHWARTZ, Chairman, Committee on Local Transportation.

Dear Sir:

You have asked us to consider the recommendation made by Mr. William Hughes Clarke, 111 West Monroe street. that the City of Chicago purchase at the foreclosure sale advertised by the Illinois Merchants Trust Company, Trustee, to be held on October 3, 1923, in the City of New York. certain shares of the capital stock of the several elevated railroad companies operating in this City (other than the Oak Park Elevated Railroad Company) deposited as collateral security to certain indebtedness of the Chicago Elevated Railways, which indebtedness is due and unpaid, and to advise you whether it is within the power of the City to purchase such shares of capital stock.

We are of the opinion that the City has not the power so to do for the following reasons:

1. The authorities in Illinois and elsewhere hold that, in the absence of express delegation of such power by the legislature, a city has no implied power to purchase or subscribe for the stock of a private corporation even though that corporation owns or operates a public utility.

Prior to the adoption of the Illinois Constitution of 1870. the Legislature could delegate to a municipality the power to subscribe for or become the owner of the stock in a railroad or other private corporation and where such power had been expressly delegated to it, a city could become the owner of such stock. But even under that state of the law our courts held that such delegation of power had to be clear and un-

equivocal and would not be implied. Dillion on Municipal Corporations (5th Ed., Vol. 1, Sec. 321) states the proposition as follows:

“Express Power Essential.—The courts concur, however, with great unanimity, in holding that there is *no implied authority in municipal corporations to incur debts or borrow money in order to become subscribers to the stock of railway companies*, and that such power must be conferred by *express grant*. To become stockholders in private corporations is manifestly foreign to the purposes intended to be subserved by the creation of municipalities; the practice of bestowing such an abnormal power is of modern origin, and hence the rule that the authority must be specially conferred, and cannot be deduced by inference or implication from the ordinary municipal grants.”

In 28 Cyc. (p. 1553) it is said:

“Municipal corporations have no inherent power to lend their credit to aid private corporations, nor to make subscriptions to or purchase stock therein, but such power is derived solely from express legislative grants, and all unauthorized municipal transactions of this character are *ultra vires* and void.”

In *Pittman v. Village of Freeburg*, 92 Ill. 111, involving a private railroad act of 1857, the court held as stated in the first head note, that:

“There is no implied authority in municipal corporations to incur debts or borrow money in order to purchase stock or subscribe for shares of stock in railroad corporations, but such authority must be conferred by express grant, and cannot be assumed from implication or innuendo, merely.”

By the adoption of the Illinois Constitution of 1870, however, the Legislature was deprived of the right, even by express grant, to delegate any such power to municipalities. The second of the “Separate Sections” of the Constitution reads:

“MUNICIPAL SUBSCRIPTIONS TO RAILROADS OR PRIVATE CORPORATIONS.

No county, city, town, township or other municipality, shall ever become subscriber to the capital stock of

any railroad or private corporation, or make donation to or loan its credit in aid of such corporation.”

(Cahill's R. S., 1921, p. 78.)

2. Even if the City of Chicago had the power to purchase the capital stock of private corporations, in our opinion it could not now purchase the capital stock of the said elevated railroad companies for the following reason:

The properties of said companies are encumbered to the extent of many millions of dollars. Even if the City in acquiring the capital stock of these companies did not assume or agree to pay the bonds constituting the encumbrance on these properties, yet under the decisions of our Supreme Court this bonded indebtedness would become a part of the City's debt. See *Evans v. Holman*, 244 Ill. 596. In that case a village had contracted to purchase an electric light plant subject to a mortgage indebtedness. It was expressly provided in the contract that the village should not assume or agree to pay such mortgage debt. The court held, however, that the mortgage debt would become the debt of the village since the village would either have to pay it or lose the equity in the property which it proposed to purchase. Since, in that case, the sum of the mortgage debt and the existing indebtedness of the village exceeded the amount of indebtedness which could be incurred by the village, the contract for the purchase of the electric light plant was held void.

Chicago, as you well know, has practically exhausted its debt-incurring power, and the addition of several million dollars of mortgage indebtedness of the elevated railroad companies (which under the decision just above cited would be considered a part of the City's indebtedness) would increase the debt of the City far beyond the amount limited by law.

We conclude, therefore, that for both of the above reasons the City has not the power to purchase the shares of capital stock of the elevated companies above named as proposed by Mr. Clarke.

It must be understood that the foregoing has reference solely to the purchase of the *shares of capital stock* of the

elevated railroad companies and does not refer to the power of the City to purchase the *properties* of those companies. As you well know, and as we have heretofore advised you, the City has the power to purchase these properties. The Public Utility Municipal Ownership Act of 1913 expressly authorizes any city in the State

“to acquire, construct, own and operate any public utility the product or service of which, or a major portion thereof, is or is to be supplied to the city or its inhabitants. * * * The term ‘public utility’ when used in this Act, means and includes any plant, equipment or property, and any franchise, license or permit, used or to be used for or in connection with the transportation of persons or property * * *.”

Respectfully submitted,

STEPHEN A. FOSTER,
WILLIAM H. SEXTON,
JEROME N. FRANK,

Counsel for the Committee.

Rights of American Telephone and Telegraph Company in the City of Chicago.

February 15, 1924.

HON. JOHN C. CLARK, Chairman, Gas, Oil and Electric Light
Committee.

Dear Sir:

Some months ago it came to the attention of the office of the Corporation Counsel that the American Telephone and Telegraph Company of New York, hereinafter referred to as the “American Company,” was engaged in business in the City of Chicago, and, as we had reason to believe, was occupying the streets of the City without any franchise, license or permit of the City authorizing it so to do. Thereupon a let-

ter was addressed to that company and in due course a reply was received. These letters were as follows:

“September 13, 1923.

American Telephone & Telegraph Company of New York,
Room 1101, 212 West Washington Street,
Chicago, Illinois.

Dear Sirs:

It has recently come to the attention of the Corporation Counsel that your company is doing an extensive public utility business in the City of Chicago without, as we understand it, having any franchise from the City of Chicago authorizing the same. You have, as we are informed, an office at the above address where a general commercial superintendent is in charge and also an office at 311 West Washington Street where you maintain traffic, plant and legal departments. The character of the business transacted by your company has appeared in part in recent proceedings pending before the Illinois Commerce Commission.

Will you kindly advise us whether we are right in our understanding that no franchise ordinance has been granted to your company by the City of Chicago.

Very truly yours,

C. M. Doty

Assistant Corporation Counsel.

Stephen A. Foster,
Special Counsel.

(Letterhead of American Telephone and Telegraph
Company, Long Lines Department.)

“Chicago, September 19, 1923.

C. M. Doty, Esq.,
Assistant Corporation Counsel,
511 City Hall, Chicago.

Dear Sir:

Replying to your letter of the 13th instant—

I beg to advise that you are right in your understanding that no franchise ordinance has been granted to this Company by the City of Chicago. As you may know, this Company's lines are outside of the City of Chicago and connect with the lines of the Illinois Bell Telephone Company at points beyond the city limits. The Company has no lines in the streets of the City.

If you desire further information in regard to the matter I would be glad to arrange to have Mr. D. F.

Hall, our local attorney, call upon you at your convenience.

Yours very truly,

W. E. Bell,

Division Commercial Superintendent."

In view of the frank admission contained in this letter of the American Company that it has no franchise from the City, the chief question which seemed to call for further investigation was the assertion in such letter that the company has no lines in the streets of the City. In our investigation of this matter, we examined the evidence, both oral and documentary, which had been introduced before the Illinois Commerce Commission in the recent rate hearings, as well as in chancery proceedings in this county, with the result that we reached the conclusion that the American Company is, in fact, now occupying the streets of Chicago. This conclusion was based upon the following, among other reasons:

1. The American Company admits that prior to 1911 it had its own lines running through the streets of Chicago to switchboards owned, maintained and operated by it in the heart of the City, and employed its own operators at these switchboards for the handling of messages transmitted over the American Company lines.

These lines of the American Company were in large part located on Kedzie avenue extending from the south to the north limits of the City and were placed on poles on both sides of the street and were connected with the so-called Morrell Park toll station of the American Company at Forty-seventh street and Kedzie avenue. These toll lines were connected with the American Company's long distance switchboard located in a building at Franklin street near Washington street by lines running through conduits in the downtown streets. So far as we have been able to learn the physical condition of these toll lines on Kedzie avenue has remained substantially the same up to the present time except that some of them have been placed under ground and undoubtedly additional lines have been constructed.

The American Company further admits that it never had any franchise, license, or permit covering portions of the City (other than the towns of Jefferson and Lake) in which these long distance lines and switchboards were then located. Such franchises, licenses and permits as the American Company formerly possessed in these towns of Jefferson and Lake prior to annexation to the City have, we believe, lapsed, and are of no significance in the present discussion.

2. Certain correspondence between the American Company and the Chicago Telephone Company, now the Illinois Bell Telephone Company (hereinafter referred to as the "Illinois Company") formed part of the exhibits introduced in evidence by the Illinois Company in the recent rate proceeding before the Illinois Commerce Commission. By this correspondence, it is claimed, the legal title of the long distance lines located in the Chicago streets was transferred in 1911 by the American Company to the Chicago Company. The local company to which this transfer was made was then and is now owned almost exclusively by the American Company, and its operations have at all times been controlled by the American Company as the parent company of the Bell System, of which system the Illinois Company forms an integral part.

Even if it be assumed that this transfer actually vested in the local company the legal title to the long distance lines located in the Chicago streets, it did not in any way interrupt or change the exclusive use of these lines by the American Company. Since, as before, the date of that purported transfer, the American Company has had the exclusive use of these lines. On the face of the documents the American Company merely became lessee where before it had been owner. In the very letter of 1911 which provided for such transfer it is expressly stated that "*the American Company will pay the Chicago Company monthly for the use of this plant*" and that "it is understood that this arrangement applies to and affects only the main line plant used for long line purposes and located upon, along, and under the streets

of the City of Chicago; to be operated in accordance with the terms of *existing agreements* between our respective companies, *the same to remain in full force* except as expressly modified by the arrangement outlined above."

Some two years after this purported transfer of the long distance lines the American Company purported to transfer to the local company certain long distance switchboards of the American Company located in telephone buildings at Franklin street and elsewhere in Chicago, and purported to transfer all of its Chicago employees necessary for the conduct of the long distance business to the employment of the local company. This was done, as is stated expressly in the above correspondence, *to meet "the question * * * raised by the City as to the right of the American Company to operate in the City of Chicago."* The phrase so used in this correspondence amounts to an admission that up to this date in 1913, and in spite of the purported transfer of the long distance lines in the streets in 1911, the American Company was still "operating in the City of Chicago." It is to be noted that this last transaction in 1913 did not purport in any way to affect either the title or use as lessee of the long distance lines in the streets of Chicago, the arrangement for which use had been made in the earlier correspondence of 1911.

Pursuant to this arrangement made in 1913 the American Company agreed to pay the local company a rental for the use of the long distance switchboards (the legal title to which it then purported to turn over to the local company) just as it previously agreed to pay the local company a rental for the long distance lines in the streets.

The transfer of Chicago employees pursuant to the above mentioned arrangement in 1913 was apparently never considered as a full and complete transfer even by the officials of the two companies, inasmuch as some of these employees were referred to, after this alleged transfer, as being "*joint employees*" of the two companies.

All of these long distance employees have at all times continued subject to the direction and control of the American Company and all of the operating practices and methods used by them are established and prescribed by the American Company and its so-called general staff.

That "*no change whatsoever has been made in the methods of handling the long distance messages in the City*" by the purported transfers of 1911 and 1913 is expressly stated in a memorandum by an official of the American Company introduced in evidence.

The mere fact that since 1913 the American Company has seen fit to hire and pay these long distance operators through the instrumentality of the Illinois Company does not make them any the less American Company employees. Indeed the way in which the wages of these long distance operators have been repaid by the American Company to the Illinois Company (plus 10% for acting as paymaster) demonstrates that they are really employees of the American Company and not employees of the Illinois Company. The local exchange operators as well as these long distance operators participate in the work of transmitting long distance telephone messages, but the American Company does not reimburse the Illinois Company for the amount of these wages (plus 10%). These local exchange operators are paid their wages by the Illinois Company and such wages are not charged directly or indirectly to the American Company. The services rendered by these exchange operators in connection with the transmission of long distance messages, to be sure, form one of the considerations for the payment of the so-called "originating commission"* by the American Company to the Illinois Company, but the amount of this commission does not in any way depend upon or fluctuate

*This originating commission of 17 cents per outgoing message includes a payment of 12 cents per message as compensation for the use of the local company's exchange plant, exchange operators' services and miscellaneous services in collecting the long distance tolls, accounting for the same, etc., and a payment of 5 cents per message as compensation for the use of certain special trunk lines forming part of the exchange plant of the local company.

with the wages of the exchange operators. In fact, it appears that the present originating commission of 17 cents per message was fixed way back in 1910 by agreement between the two companies and has not been increased even though the wages of the operators have been largely increased since that date. The difference in the manner of treating the wages of these two classes of operators emphasizes the fact that the long distance operators are in reality employees of the American Company, while the exchange operators are employees of the Illinois Company.

In 1913 the American Company also agreed that it would reimburse the local company for any other expenses to which it might be put in connection with the operation of this long distance plant, plus a commission of ten per cent, thus further emphasizing the fact that the long distance business is American Company business.

Whatever view is taken of the technical meaning of these alleged transfers, it is clear that the American Company still causes the long distance lines in Chicago to be maintained and operated and is in all respects as regards that business the principal. In so far as the Illinois Company can be said to conduct any operations in respect to the long distance lines it acts only as agent for or on behalf of and at the command of the American Company.

The long distance lines located in the streets of Chicago connect at the territorial limits of the City, without any physical interruption whatsoever, with long distance lines outside the City which admittedly still belong to, or are controlled and operated by, the American Company. It is admitted that the American Company is the operating company of that portion of these continuous long distance lines lying outside the City limits, and it cannot, we believe, be successfully maintained that such operation stops arbitrarily at the City limits where, as above stated, there is no physical interruption in the continuity of these lines. In view of the fact that the American Company controls the local subsidiary company so completely that the latter is in reality merely a

department of the former, and in view of the obvious purpose of the purported transfer to evade the regulatory powers of the City of Chicago over these long distance lines, it might well be claimed that such purported transfer was a mere device and subterfuge, and should be entirely disregarded so far as the rights and powers of the City are concerned. Under this view the American Company would still be held to be the owner of the legal title of these long distance lines.

Furthermore, it is significant that the purported leasing of the long distance plant in Chicago by the Illinois Company to the American Company has no limit as to time. This again shows that the American Company has, for all intents and purposes, the ownership or the equivalent of ownership of these lines.

However, if it be assumed that this purported transfer was effective to the extent of vesting the bare legal title of the long distance lines in the local company, this would not, under the facts above set forth, alter the rights of the American Company or the power of the City with reference to those lines. If the American Company is not still the legal owner of these long distance lines, it is at least the exclusive lessee thereof, and it cannot enjoy any privileges as lessee of these lines or make any use thereof without a franchise ordinance from the City.

The additional facts set forth below confirm the conclusion above stated that the American Company is at least a lessee of these long distance lines and has at all times continued to operate the same.

3. Long distance messages from, or to, Chicago are treated between the two companies as being messages of the American Company—as distinguished from those of the Illinois Company—all the way from, or, to, the point of origin or destination in Chicago, thus including their transmission over the long distance lines in the City's streets. The charges made for such long distance messages are fixed by the American Company and published in their tariffs filed with the Illinois Commerce Commission. These charges cover their trans-

mission from, or to, such point of origin or destination in Chicago. While the Illinois Company collects the tolls on these long distance messages originating in Chicago, it accounts for them to the American Company and receives therefrom only the "originating commission" and other compensation above described. The Illinois Company does not share with the American Company in the gross tolls received from such long distance messages on any pro rata basis (*i. e.*, on the basis of the relative length of their respective lines used in such transmission) as is usual when two companies are jointly engaged in the transmission of messages over their lines. The fact that the Illinois Company's compensation is not reckoned on such basis for the use of the long distance lines in the City of Chicago but on the basis of a yearly rental for the exclusive use of such lines confirms the conclusion above set forth that the American Company and not the Illinois Company, is using these lines and conducting the long distance business over them.

4. It appeared in evidence in legal proceedings formerly pending in this county that the American Company employed and paid long distance operators at certain points in this and other states who made the connections over the long distance lines of the American Company running to Chicago and through the City's street to the long distance switchboards located in the heart of the City. There is no pretense that these long distance operators at the points above referred to were anything but American Company employees, and the transmission of the messages from the distant points to the long distance switchboards located in the heart of Chicago was directed and controlled by such American Company's operators at such distant points.

5. In addition to the long distance telephone business above referred to, there is conducted over the same long distance lines running through the streets of the City and thence to distant points the so-called "leased wire" business under contracts made with brokers and others for their private use of those lines. These contracts for "leased wire" service

are made by the American Company, and the Illinois Company has nothing to do with the making thereof and shares in the compensation paid only to the extent of a rental for the portion of its plant that is used by the American Company in this business. The necessary instruments for the operation of these "leased wire" lines are installed by the American Company in the offices of the brokers and other patrons in Chicago and elsewhere who have leased such lines. Doubtless the negotiation of these "leased wire" contracts, the installation of the necessary instruments and the supervision of this service, form an important part of the work of the officials of the American Company located in Chicago and hereinafter more particularly described. In short, this "leased wire" business is carried on by the American Company in Chicago, as elsewhere, quite independently of the Illinois Company except in so far as the American Company leases and pays a rental for the long distance lines in the streets of Chicago and for portions of the Illinois Company's plant.

6. This "leased wire" business is very profitable to the American Company. In fact it has been said by former telephone officials that it was only because of the large volume and profitable character of this "leased wire" business between the great commercial centers, such as Chicago, New York, Pittsburgh, Buffalo and Cleveland that the American Company was enabled to derive profits from its long distance lines immediately after their construction to and into the City of Chicago. The fact that telegraphic and telephonic messages can be transmitted simultaneously over the very same wires makes this "leased wire" business, which consists for the most part of telegraphic messages, particularly desirable from the standpoint of the company. These leased wires can still be used for telephonic communication, and thus produce a double revenue.

We believe that the division now made between the American Company and the Illinois Company of the large revenues of this "leased wire" business is most unfair both

to the Illinois Company and to the City of Chicago. Under existing arrangements the only compensation which the City of Chicago receives from either of the telephone companies is the three per cent (3%) of its gross receipts paid by the Illinois Company. The City is therefore directly interested in seeing to it that the division of revenues between the American Company and the Illinois Company is fair to the latter. The City's three per cent (3%) of the amount paid by the American Company to the Illinois Company on account of this "leased wire" business is, we believe, altogether inadequate compensation for the use of the City's streets in connection therewith and should be materially increased, and proper recognition given to the fact that this "leased wire" business originates or terminates within the City limits and that the large revenues derived by the American Company from brokers and others enjoying this "leased wire" service could not be obtained, were it not for the use of the long distance lines located in Chicago's streets.

The American Company should be required to file with the City complete reports disclosing the entire amount of revenue derived by it from this "leased wire" business between Chicago and other points and should pay to the City compensation for such use of the streets as would be adequate, having due regard to the volume of the business carried on and the revenues derived therefrom. If, as hereafter recommended, an ordinance is passed for the regulation and control of the American Company's business in the City of Chicago, appropriate provision should be made therein for the payment of compensation to the City for the privilege of conducting this "leased wire" business.

7. In the same way the compensation to be paid the City for the use of its streets for the conduct of the long distance business should in our opinion be materially increased. As we have already pointed out, at present the Illinois Company receives from the American Company, in addition to the rental for the use of the long distance lines, what is known as an "originating commission" of 17 cents

on each outgoing message. Inasmuch as nothing is paid on the corresponding incoming message it is assumed that this originating commission amounts to $8\frac{1}{2}$ cents on each originating and outgoing message.

We believe that this "originating commission" is altogether inadequate to compensate the Illinois Company for the numerous considerations rendered by that company, including the use of its exchange plant, the securing and furnishing of the telephone subscribers, the services of the exchange operators, the collection of and accounting for the toll revenues, local advertising, etc. The only compensation received by the City from the telephone companies being based upon three per cent (3%) of the gross receipts of the Illinois Company, any increase in the amount of the "originating commission" paid the Illinois Company would correspondingly increase the compensation paid to the City. We believe that if, as hereinafter suggested, an ordinance is passed regulating the conduct of the long distance business in the City of Chicago, provision should be made for the payment to the City of more adequate compensation for such use of its streets.

A good deal of evidence concerning the manner in which the American Company handled both the long distance and the "leased wire" business was brought out by us in the recent telephone rate proceeding before the Illinois Commerce Commission, and other evidence of the same sort was presented in the earlier chancery proceeding of *Reed v. Central Union Telephone Company* heard by His Honor, Mayor Dever, when he was a judge of the Superior Court. In the final decree entered in the last mentioned case Judge Dever ordered the American Company to account to the minority stockholders of the Central Union Telephone Company (a former Bell subsidiary then operating in parts of Illinois outside of Chicago and in Indiana and Ohio whose Illinois properties have since been acquired by the Illinois Company) for its conduct of both those classes of business in Central Union territory. Many of the facts stated in this

opinion are taken from the sworn testimony of Bell witnesses and from documents produced from their files and placed in evidence in one or the other of the two cases above referred to.

8. Long after the making in 1911 and 1913 of the arrangements above set forth purporting to transfer to the local company the long distance plant and the long distance operators, the American Company and the Illinois Company, in 1919, entered into an agreement which, according to its terms, stated and reaffirmed the contractual relations that then existed and had theretofore existed between the two companies. This agreement expressly gave the American Company the right to connect its long distance lines with the exchanges of the Illinois Company, and the Illinois Company agreed to handle the telephone communications from such switchboards to its subscribers. The plan of operation contemplated by this agreement, and stated by it to exist in fact, was obviously that the American Company should operate the long distance lines to the long distance switchboards, and that the Illinois Company should transmit the messages only from such switchboards to the telephone subscribers.

The provisions above referred to certainly tend to confirm the conclusion that the American Company under the intercorporate arrangements between the two companies claims the right to, and does in fact, use as owner or lessee the long distance lines in the streets of Chicago.

9. The American Company admits that it has for many years maintained offices in the City of Chicago and is doing business here. Its principal office in Chicago is at 212 West Washington street, and its chief representative is W. E. Bell, its general commercial superintendent. It also maintains an office at 311 West Washington street for its traffic, plant and legal departments, and at these offices records have been and are now being kept. This statement with reference to its offices and representatives is taken directly from the answer filed by the American Company on May 25, 1922.

in a proceeding before the Illinois Commerce Commission, entitled "Illinois Commerce Commission, on its own motion, *vs.* American Telephone and Telegraph Company, No. 12394."

The American Company has complied with the statutes of this State requiring foreign corporations doing business in this State to appoint an agent here for the service of legal process and has, we are informed, named as such agent one of its Chicago representatives. The American Company files annual reports and tariffs of its rates and charges with the Illinois Commerce Commission.

10. Our conclusion from all of the facts above stated is that the American Company, in spite of the alleged transfers made in 1911 and 1913, and above described, is still using the long distance telephone lines located in the City's streets either as owner or lessee, and is conducting over these lines in Chicago both the long distance and "leased wire" business. Our conclusion further is that the City is receiving inadequate compensation for the use of the streets in this long distance and "leased wire" business, and that adequate compensation can be secured by appropriate proceedings.

11. In view of the conclusion above stated that the American Company is either the owner or lessee in possession of the long distance lines in the streets of Chicago and the admission of the American Company that it has no franchise ordinance, it seems unnecessary to make any extended comment on the franchise rights of the Illinois Company under its ordinance of 1907. The American Company does not claim that it has derived any rights under that ordinance, and such claim, if made, could not be successfully maintained. Even if the Illinois Company had attempted to assign to the American Company that ordinance or any claim thereunder, such assignment would have been inoperative if made without the consent of the City. So far as appears, no such assignment by the Illinois Company has ever been attempted, and surely no such consent by the City has ever been given. This ordinance of the Illinois Company therefore

did not confer any authority, and could not form any justification, for the occupation and operation by the American Company of long distance lines in the streets of Chicago.

12. We recommend that an ordinance be prepared regulating the use of the long distance lines now located in the streets of Chicago and the long distance and "leased wire" business now conducted over these lines.

Such ordinance should provide, among other things:

(a) That a franchise, license or permit be granted to the American Company for a term expiring simultaneously with the 1907 grant to the Chicago Telephone Company (now the Illinois Bell Telephone Company) to conduct under proper terms, conditions, limitations and restrictions a long distance telephone business and a "leased wire" business in the City of Chicago.

(b) That the users of such long distance and "leased wire" service within the City of Chicago be given protection as to service and charges, so far as the same can lawfully be embodied in such ordinance.

(c) That adequate compensation be paid to the City of Chicago for the use of its streets, having due regard to the volume of the business transacted and the income derived by the American Company therefrom.

(d) That a complete and detailed description be furnished by the American Company of all the long distance lines now located within the City of Chicago (including data as to what lines are under ground and what are carried on poles above ground) and that the American Company be required to report from time to time all changes and additions made in these lines.

(e) That any permits hereafter to be granted by the City for additions and repairs to such long distance lines should indicate the character of the business conducted over the lines so to be installed or repaired.

(f) That the American Company be required to report quarterly or every six months the total income

derived by it (1) from long distance messages originating within the City of Chicago and (2) from the "leased wire" business over lines terminating in the City of Chicago.

Should your committee conclude that such an ordinance as above suggested is desirable, we will prepare a draft and present it at an early date to your committee for its consideration.

We would further suggest that the American Company be notified of the contemplated action and be given an opportunity to be heard as to the terms to be embodied in such an ordinance.

Respectfully submitted,

FRANCIS X. BUSCH,

Corporation Counsel.

STEPHEN A. FOSTER,

Special Counsel.

**Assessment of Cost of Construction of Subways
Against Private Property Specially
Benefited Thereby.**

February 16, 1924.

ALDERMAN WILEY W. MILLS, City Council Chambers.

My Dear Alderman:

I beg to acknowledge receipt of your letter of the 15th instant asking that I furnish you with a brief of information and authority bearing upon the subject of assessing the cost of construction of subways against the private property specially benefited by such an improvement.

In reply, beg to say that this a matter to which I have been giving attention for some time. Upon going over the records of this office, I find that there have been a number of very well considered opinions rendered upon this sub-

ject, specific reference to which opinions is contained in the last paragraph of this letter.

I have prepared a memorandum, after a reading of these various opinions and an examination of numerous authorities on the present power of the City of Chicago to build and finance the cost of constructing subways by special assessment and a consideration of sundry reports and data showing how far other municipalities have availed themselves of this method of financing such improvements.

In so far as statement is made of the possible length or termini of either a "comprehensive" or "central" subway, such statement is merely for illustrative purposes, and is not to be taken as indicating even the considered opinion of the author of the proper extent or location of such subways. The purpose is rather to present for intelligent and practical consideration and discussion two questions: first, to what extent, if at all, can subways be built under the existing Local Improvement Act, and second, if subway construction can be so undertaken, what are the advantages and disadvantages of such a program.

The opinions which have been studied and considered in this connection are: opinion of former Corporation Counsel Major Edgar Bronson Tolman (Opinions of Corporation Counsel and Assistants, 1897-05, pages 320-326); opinion of Assistant Corporation Counsel Eugene H. Dupee and Harry F. Atwood, November 17, 1915; opinion of Assistant Corporation Counsel Ralph I. Crandall, February 11, 1923; memorandum brief, entitled "To What Extent Can the Local Improvement Act be Advantageously Used for the Building of Subways," by Hon. William H. Sexton, former Corporation Counsel, dated November 27, 1923.

I am assuming that you will present this memorandum to the Local Transportation Committee, and for that reason am sending a copy to Alderman U. S. Schwartz, Chairman of the Local Transportation Committee.

Very truly yours,

FRANCIS X. BUSCH,

Corporation Counsel.

MEMORANDUM.

THE BUILDING OF A SUBWAY BY SPECIAL ASSESSMENT.

This subject is considered under the following heads:

- I. What Constitutes a Local Improvement?
- II. Different Types of Subways.
- III. Are "Subways" Street Improvements?
- IV. Could a "Comprehensive Subway" (as illustrated in Section 11) be built by Special Assessment?
- V. Could a "Central Subway" (as illustrated in Section 11) Be Built by Special Assessment?
- VI. What Have Been the Decisions of Courts on the Specific Question of the Right to Build Subways by Special Assessment?
- VII. What Are the Advantages of Building and Financing Subways by Special Assessment?
- VIII. Incidents Necessary to Be Considered in a Plan to Build Subways by Special Assessment.

I.

WHAT CONSTITUTES A LOCAL IMPROVEMENT?

Article IX, Section 9, of the Illinois Constitution provides:

"The general assembly may vest the corporate authorities of cities, towns and villages with power to make *local improvements* by special assessment, or by special taxation of contiguous property, or otherwise."

In Section 1 of the Local Improvement Act of 1897, the General Assembly enacted:

"That the corporate authorities of cities, villages and incorporated towns are hereby vested with the power to make such *local improvements* as are authorized by law by special assessment, or by special taxation of con-

tiguous property, or by general taxation, or otherwise, as they shall by ordinance prescribe."

Section 10 of the Municipal Ownership Act provides:

"The expense of acquiring any such public utility, or the property necessary or appropriate for the operation thereof, or any part thereof, either by purchase, condemnation, or construction, or such part of the expense as may be just and reasonable, may in any city be assessed upon and collected from the property and real estate specially benefited thereby, if any, in such manner as is or may be provided by law for the making of special assessments for local improvements in such city."

Section 2 of the same act defines the term "Public Utility" as including "any plant, equipment or property * * * used or to be used for or in connection with the transportation of persons or property."

Necessarily the answer to the question under discussion involves a consideration of the term "local improvement." Neither the Constitution nor the statute anywhere defines a local improvement or declares what attributes it must possess, or attempts to enumerate all the specific kinds of local improvements. Paving, which is perhaps the most common of all improvements, is nowhere mentioned. In the statute, however, special provision is made for a few types of improvements, as sidewalks (Sections 7 and 34), water service pipes and house drains (Sections 7 and 41), and it is *not without significance that among these mention is also made of "subways."* This occurs in Section 42, which contains the following passage:

"Any such special assessment or special tax levy for building sewers, *subways* or viaducts may in like manner be divided into not exceeding twenty (20) installments." (Dupee's opinion.)

Turning from the statute to the decisions we find that the Supreme Court has frequently essayed to define what constitutes a local improvement.

In City of Chicago v. Blair, 149 Ill. 310, at page 314, the court says:

“A local improvement within the meaning of the statute is a public improvement, which by reason of its being confined to a locality, enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality.”

In Northwestern University et al. v. Village of Wilmette, 230 Ill. 80, it was said:

“A local improvement is defined to be ‘a public improvement, which by reason of its being confined to a locality, enhances the value of adjacent property, as distinguished from benefits diffused by it throughout the municipality.’ (*City of Chicago v. Blair*, 149 Ill. 310.) While it may be true that a system of relief sewers like the system in question will be a benefit to all the property in the village, this is not the test. If the improvement will enhance specially the property adjacent to which it is made, the improvement is local within the meaning of the law, and may be paid for by special assessment upon the property benefited.”

In Loeffler v. City of Chicago et al., 246 Ill. 43, the court said, at page 51:

“What is a local improvement? That term was first mentioned in the constitution of 1870. (Mason & Fuller on Special Assessments, Sec. 32.) The term ‘local improvements’ as used in said Sec. 9 of Art. 9 of the constitution, means such improvements as are paid for by special assessment or special taxation. (*Wilson v. Board of Trustees*, 133 Ill. 443.) In a certain sense all improvements within a municipality are local, that is, they do not extend to all parts of the state. They have, however, locality—that is, they are nearer to some persons and property than others. Under the constitution of 1848 as well as under the present constitution, it has been held that a special assessment means ‘an assessment to pay for an improvement for public purposes upon real property which is by reason of the locality of the improvement specially benefited beyond the benefits by the improvement to real property generally throughout the municipality proportioned by such benefits.’ (*Wilson v. Board of Trustees*, *supra*, p. 469.) A local

improvement is a public improvement 'which by reason of its being confined to a locality enhances the value of adjacent property as distinguished from benefits diffused by it throughout the municipality.' (*Northwestern University v. Village of Wilmette*, 230 Ill. 80; *City of Chicago v. Blair*, 149 Ill. 310; *Illinois Central Railroad Co. v. City of Decatur*, 154 Ill. 173.) The test as to whether such an improvement is local is whether it specially benefits the property assessed. (*Ewart v. Village of Western Springs*, 180 Ill. 318.) An improvement may be local though of some general benefit to the public when the substantial benefits to be derived from it are local in their nature and the portion of the city where the improvement is made will be specially and peculiarly benefited in the enhancement of the value of the property. (*Fisher v. City of Chicago*, 213 Ill. 268; *City of Chicago v. Law*, 144 *id.* 569; *Enos v. City of Springfield*, 113 *id.* 65; 25 Am. & Eng. Ency. of Law, 2d Ed., 1176, and cases cited; 25 Cyc. 1533n, and cases cited.)''

Both the *Northwestern University* case and the *Loeffler* case have been cited on this point with approval in *City of Elmhurst v. Rohmeyer*, 297 Ill. 430, page 437.

In the case of *City of Waukegan v. De Wolf*, 258 Ill. 374, at page 381, the court concluded a discussion of the nature of local improvements as follows:

"These and other cases (referring to cases previously cited in the opinion including the *Blair* and *Loeffler* cases, *supra*) demonstrate that the question whether an improvement is a local one, within the meaning of the constitution and statute, does not depend upon the fact that there are incidental or indirect public benefits for which an equitable portion of the cost may be assessed to the municipality as contemplated by the statute and is not determined by the fact that some property in the municipality is benefited to a greater degree than other property, but does depend upon the nature of the improvement, and whether the substantial benefits to be derived are local or general in their nature. If its purpose and effect are to improve a locality it is a local improvement, although there is incidental benefit to the public, but if the primary purpose and effect are to benefit the public, it is not a local improvement, although it may incidentally benefit property in a particular locality.

“So far as the language employed in the case of *City of Chicago v. De Wolf, supra*, may seem to announce a new and narrower division of a local improvement, it should be interpreted in connection with the very peculiar circumstances of that case. The assessment there was for the construction of an improvement less than 500 feet in length in a city three miles long, and in the assessment roll ‘all the land in the City consisting of 7000 tracts was assessed.’ ” (Dupee’s opinion.)

In *City of Springfield v. Springfield Railway Company*, 296 Ill. 17, nine years after the decision in the *Waukegan* case, the court, speaking by Mr. Justice Dunn, sustained a special assessment for an electric street lighting system for street lighting purposes only, and the objection was made that such an improvement was a general improvement and not a local improvement. He said, on page 19:

“The only essential elements of a local improvement are those which the term itself implies, viz: that it shall benefit the property on which the cost is assessed in a manner local in its nature and not enjoyed by property, generally, in the city. * * * If the improvement will enhance specially the property adjacent to which it is made, the improvement is a local improvement.”

“A review of these cases sustains the following propositions:

(1) A local improvement is a public improvement of a permanent character the effect of which is to appreciate the fair cash value of property by reason of its contiguity to the improvement.

(2) Even though there be some general public benefit, the improvement will be classified as local if the substantial effect of the improvement is to enhance the value of private property in the neighborhood.” (Sexton’s memorandum brief.)

II.

DIFFERENT TYPES OF SUBWAYS CONSIDERED.

In general discussion regarding the desirability of subway construction, one encounters two classes of subway ad-

vocates—those favoring a so-called “comprehensive” subway, and those favoring the construction of subways within a more limited area designed to remove the surface or elevated cars, or both, from the heavily traveled thoroughfares in the central business district. For want of a better term, I have denominated this last mentioned type of subway as a “central” subway.

For purposes of illustration, a “comprehensive” subway might comprehend the building of “lower level streets” or “tubes” for long distances, *designed to supply a new form of rapid transit to all parts of the city*, say—for example—along State street, Clark street, Halsted street, Ashland avenue, Western avenue, Kedzie avenue, Crawford avenue and Cicero avenue from approximately the City limits on the south to the City limits on the north and along Madison street, Jackson boulevard, Van Buren street, 12th street, 22d street, 31st street, 39th street, 47th street, 55th street, 63d street, 71st street, 79th street, and possibly to 87th street, 95th street, 103d street and 111th street, and along Lake street, Kinzie street, Chicago avenue, Fullerton avenue, Belmont avenue, Irving Park boulevard, and possibly Lawrence avenue and Devon avenue from Lake Michigan to approximately the City limits on the west, and along such great diagonal thoroughfares as Blue Island avenue, Ogden avenue, Milwaukee avenue and Elston avenue from their beginnings to the City limits.

Likewise, for illustration merely, a “central subway” might comprehend the building of “lower level streets” or “tubes” for relatively short distances, *designed for use by existing elevated lines or existing surface lines, or both*, say—for example—along State street or Clark street, and along Wells street, Franklin street, Market street or Canal street, from Chicago avenue or North avenue to 18th street or 22d street, and along Madison street and Jackson boulevard connecting with the State or Clark street subway (whichever one might be built) and extending west as far, possibly, as Halsted street.

III.

ARE SUBWAYS STREET IMPROVEMENTS?

Reference has already been made to the fact that neither the Constitution nor the statutes attempt to enumerate all of the specific cases of local improvements. The statute does, in Section 42, refer to "subways"; likewise Section 62 mentions "bridges, viaducts and *tunnels*."

"A subway such as is here contemplated is located in and along the lines of the public highways, and is in effect nothing more than the use for street purposes of a portion of the space underneath the natural level of the ground. *A street with a subway is a street with two levels. The lower level is a subway, but still a street.* This is recognized by the opinion of the Supreme Court in the case of *Barsaloux v. City of Chicago*, 245 Ill. 598, in which the court held that a railway operated in the subway would be a street railway within the meaning of the Mueller Law authorizing cities to acquire and operate street railways.

"On page 608, *supra*, the court cites from *In re New York District Railroad Co.*, 14 Northeastern Reporter 187, in which the New York Court of Appeals said:

" 'When the work is all done, the street will consist of two stories or surfaces, one carrying the ordinary traffic and movement lessened by so much as is diverted to the swifter transit of the other, and both together will do what one alone did to the extent of its capacity.' "

Thus it appears that a subway is essentially a street improvement.

IV.

COULD A "COMPREHENSIVE SUBWAY" (AS ABOVE ILLUSTRATED) BE BUILT BY SPECIAL ASSESSMENT?

For the very reason that such a subway is "comprehensive" and "designed to supply a new form of rapid transit to all parts of the city" it is feared that courts would hold that the primary purpose and effect of such a subway were

to benefit the public at large, even though particular property (*e. g.*, that in close proximity to stations and portals) might incidentally be peculiarly and specially benefited. As was said in *Northwestern University v. Village of Wilmette, supra*, the benefits of such an improvement would be "diffused by it throughout the municipality." An endeavor to "spread" a special assessment for such a "comprehensive" improvement would involve assessing practically every piece of property in the City of Chicago and might be held by the Supreme Court to bring the case within the adverse ruling in *City of Waukegan v. De Wolf, supra*.

The above should not be understood as indicating that extensive subway construction could not be undertaken by special assessment, or that additions to an existing subway of limited extent could not be built by special assessment. Quite the contrary. For the reasons indicated in V, post, a specific addition (say for illustration six miles along Madison street or six miles along Clark street) to connect with an existing central subway would be so essentially a "local improvement" that there could be no question as to the legal authority for the construction of such an addition by special assessment.

V.

COULD A "CENTRAL SUBWAY" (AS ABOVE ILLUSTRATED) BE BUILT BY SPECIAL ASSESSMENT?

Such a subway is clearly "local" in the sense of the ordinary use of that term, being confined to a relatively small area, four or five miles north and south and two or three miles east and west. Again adverting to the *Blair* case, *supra*, does such a "central subway" come within the definition of a local improvement as there stated, viz: "a public improvement which by reason of its being confined to a locality enhances the value of the adjacent property as distinguished from benefits diffused by it throughout the municipality."

"Such a subway will be a street improvement intended to facilitate public travel by rapid transit *particularly* within the limits of the territory traversed. Stations at intervals along the routes selected will make the subway accessible to property in the vicinity of the stations and to a considerable distance from them, such property will be specially enhanced in value by reason of the rapid transit thus afforded to and from the heart of the city. It has been the experience of New York and other cities where subway systems have been constructed that in outlying and remoter portions of the city accessible to such subways rapid settlement has occurred and property values *along the line have increased to a remarkable extent.*" (Sexton's opinion.)

An excerpt from a very recent report of the Detroit Rapid Transit Commission to the mayor of Detroit states these facts with demonstrative clearness. In Section 14 of Part Two of that report it is said (page 40):

"14. The local benefit is that especially derived from rapid transit by the property owners in the vicinity of the lines. This benefit is much more important than the benefit to the City at large * * *.

"Population is quickly attracted to a rapid transit line along its entire length. Business concentrates along such a line. These things all promote a greater demand for the land within easy access of the line. This demand in turn increases the land value to an extraordinary degree. The influence of this local enhancement extends in a diminishing degree out to about a half-mile on each side of the line. This represents about the limit of the area conveniently accessible to the facility.

"As an illustration of the local benefits that result from furnishing rapid transit, two cases in New York where great benefits actually resulted, and that were analyzed in detail by the New York City Club may be cited as examples.

"As soon as the rapid transit program was announced and construction was begun the land started to increase in value. In some sections, particularly where stations were located, there was almost a riot of buying and selling. Prices soared over night. Property changed hands from day to day. Increases in value continued in fluctuating amount even after the lines were completed and operation had begun.

“In upper Manhattan above One Hundred and Thirty-fifth street for a distance of about 4.4 miles, the total value of the land affected was about \$47,306,000, in 1900 before the rapid transit line was constructed. In 1907 after operation was under way this same land had increased in value to approximately \$116,608,000. This represented a total increase of about \$69,300,000, or a total increase of about 147% during the seven year period. All of this was not due to rapid transit. It was estimated that the normal increase would have been about 43%, or about \$20,100,000. Consequently, the increase over this 4.4 mile stretch due to rapid transit line alone was about 104 per cent, or \$49,200,000 in seven years.

“The cost of constructing (not equipping) the rapid transit line traversing this district was only a little over \$7,000,000. So here the increase in the aggregate was about seven times the construction cost of the facility.

“The foregoing increases are more striking if reduced to a per mile of route basis. Thus reduced they mean that the land served by this 4.4 miles of rapid transit route that would have normally increased about \$4,568,000 per mile, actually did increase about \$15,750,000 per mile. Therefore, the increases due to the rapid transit line alone amounted to about \$11,182,000 per mile of route in seven years.

“In the Bronx over a strip one-half mile wide, each side of the line, there was a similar total increase from an original value of \$33,242,000 to a new value of about \$78,047,000—an increase of about 134 per cent. The normal increase should have been about \$13,500,000—or about 40 per cent—so the increase due to rapid transit alone in seven years was about \$31,300,000—or 94 per cent.

“This section of line cost about \$5,700,000 to construct, so the enhancement here due to rapid transit (\$31,300,000) was nearly $5\frac{1}{2}$ times the cost of the facility.

“The length of this line was about 3.8 miles. Therefore, the per mile normal increase was about \$3,553,000. And due to rapid transit alone the increase was \$8,237,000 per mile of route in seven years.

“These two cases indicate the extraordinary local benefit that accrues as a result of rapid transit. In seven years the abutting and nearby property along

these lines enhanced in value about \$11,000,000 and \$8,000,000 per mile of line respectively, on the average, over about 8 miles of line altogether. In the former case the line was almost all subway, and in the latter it was almost all elevated. Although these amounts would have constructed the rapid transit line that produced the benefits 7 and $5\frac{1}{2}$ times over respectively, it all went into the pockets of the individuals owning property. They received all this benefit free. This is not fair to the community at large or to the rapid transit rider."

Mr. Dupee's opinion, above referred to, emphasizes the equity of private property specially benefited sharing the cost of such a subway improvement. He says:

"It is not equitable that the property which is specially and peculiarly benefited by reason of its accessibility to the subway system should derive this special and peculiar benefit without sharing more of the burden of the cost of such an improvement than is shared by the remoter property. Such special benefits would be a basis of special assessment upon the property favorably located.

"It is precisely this situation the Local Improvement Act was designed to meet and which is treated by means of this Act with a more equitable and just distribution of the burden of a public improvement than is possible under any other system of paying for the subway than can be devised.

"These considerations lead to the conclusion that a subway serving a given part of the City and conferring a special benefit upon property in the vicinity may be a local improvement. In this view we are fortified by an opinion rendered in 1902 by Major Edgar B. Tolman, who was then attorney for the Board of Local Improvements and afterwards Corporation Counsel, in which he held that the construction of a subway system would be a local improvement, a portion of the cost of which might be defrayed by special assessment.

"In the course of his opinion Major Tolman said: 'The fact, therefore, that an improvement may be of great public value is no reason why it should not be considered as a local improvement within the meaning of the law. On the contrary, if there be elements of benefit to private property and of benefit to the mu-

nicipality as a whole, the concurrence of these two elements brings the case absolutely within the statute.'

"And he concludes: 'I am clearly of the opinion that the Local Improvement Act now in force affords unquestioned legal authority for the construction of a system of tunnels or subways by special assessment. * * * The construction of such subway by special assessment is, in my opinion, lawful.' (Opinions of the Corporation Counsel and Assistants, 1897-1905, pp. 320-326.)"

(NOTE: If it be said that the above quoted excerpt from Major Tolman's opinion has application alike to a comprehensive subway or a central subway, it should be borne in mind that Major Tolman's opinion was given before the decision of the Supreme Court in *City of Waukegan v. De Wolf*, *supra*.)

V I.

WHAT HAVE BEEN THE DECISIONS OF THE COURTS ON THE SPECIFIC QUESTION OF THE RIGHT TO BUILD SUBWAYS BY SPECIAL ASSESSMENT?

"The construction of similar improvements by special assessment has been sustained by the courts. Reference is here made to three such cases.

"In *L. & N. R. R. Co. v. City of East St. Louis*, 134 Ill. 656, the facts showed that the City of East St. Louis passed an ordinance for the construction of a viaduct across several railroad tracks and Cahokia Creek, the cost of the improvement to be paid for by special assessment. Part of the cost was assessed against the private property benefited and part against the City of East St. Louis for public benefits.

"The objection was made at the trial below and on appeal that the improvement described was not a local improvement within the meaning of the special assessment statute, but it was held that the improvement was a local improvement. It is worthy of notice that in that case the court cited Section 62 of Article V of Chapter 24 of the Revised Statutes, granting power to the city 'to construct * * * bridges, viaducts and tunnels.' 'Viaducts and tunnels' were therefore placed in the same

category, and 'Tunnels and subways' are synonymous terms.

"In *Milheim et al. v. Moffat Tunnel Improvement District*, 43 Sup. Ct. Rep. 694, the Supreme Court of the United States recently sustained a special assessment proceeding in the State of Colorado for the construction of a gigantic tunnel under miles of mountain ranges for the use of railways and other agencies of transportation, public and private, thus obviating the interruption in communication between different parts of the state across said mountain ranges during the seasons of the year when traffic would otherwise be impossible on account of snow and ice.

"In *Lawson v. the City and County of San Francisco*, 182 Cal. 1, the Supreme Court of that state had before it the question of the validity of a special assessment proceeding to pay for the cost of the Twin Peaks tunnel through a high ridge of hills separating the more densely populated portion of San Francisco from the large and comparatively level region lying west of the ridge and constituting the water shed of Lake Merced. The City levied an assessment on lands near both ends of the tunnel on the theory that such lands were benefited by reason of the improved transportation facilities. The tunnel could only be used by street car lines and there were no provisions in it for use by persons traveling on foot or by private conveyances, and the contention was that this was not a local improvement. The court said, page 9:

" 'We are satisfied that the construction of the tunnel here involved is specially beneficial to the property upon which the assessment is levied, to the extent necessary to justify the assessment. The districts assessed * * * include a large area southwesterly of the Twin Peaks ridge and another but more limited area in the neighborhood of the easterly extremity of the tunnel. Before the making of the tunnel the inhabitants of the more remote districts could not reach the city by means of street cars except by route involving considerable delay and means of access to the city was confined to such street car lines and to travel by vehicle and on foot over steep hills. By reason of the construction of this tunnel and the operation of a street car line through it, they have a ready and speedy means of access to the city and the resulting benefit to their property is apparent.'

“The right of the city to construct the improvement as a local improvement and to assess the cost of it on private property in proportion to the benefits was sustained.

“It will be observed that in the two cases last cited the tunnels respectively were to be used by existing railway and street railway lines and the point in each case was presented that this made the improvement a private improvement for the benefit of street railway companies and not a public improvement. But in both cases these contentions were overruled. These cases therefore stand as authority for the proposition that if the construction of a subway in Chicago results in the substantial appreciation of property in the neighborhood of the proposed construction it will in no way militate against the rights of the city to pay for the cost of the improvement by special assessment proceedings because the tunnel may be used by existing street railway or elevated railway companies.” (Sexton’s memorandum brief.)

(NOTE: In this connection it should be noted that New York City actually anticipated the ultimate need of building rapid transit lines by assessment, and the State of New York provided the necessary legislation.)

Reference is again made to the report of the Detroit Rapid Transit Commission to the mayor of Detroit:

“The 1914 Conservancy Law of Ohio is another well known assessment project. It was devised to furnish money to build works to prevent floods from damaging or destroying cities, towns, farms and public highways. The benefits under such a project are more difficult to visualize than benefits that come from rapid transit. Yet the public recognized its equity.

The New York Rapid Transit Act of 1891, as amended in 1911, over 12 years ago, actually anticipated the ultimate need of building rapid transit lines by assessment. A complete plan for doing this was provided in this law. It is true that this plan has never been utilized in New York, but this is merely because the city got started wrong. Its first subway was built on borrowed money, assisted with private capital. This project proved to be such a financial bonanza, that thereafter the property owners would not listen to an assessment project, but insisted on continuing to use bor-

rowed money and private capital. The city and these private companies have expended over \$550,000,000 on these projects. With a precedent established to this extent, it is difficult now for those along proposed new lines to be converted to the viewpoint that they should help pay for their rapid transit lines when so much private, city and car rider money has already been spent for the old lines, and when those along such lines have reaped all the benefits for themselves. But now the situation is different in New York. The War has so changed conditions with respect to the costs of such projects and the possible profits from them, and New York is so near its debt limit, that there may have to be a change in financing there before existing facilities can be materially increased.

But the fact that New York, with the necessary laws available has not constructed its rapid transit lines by assessment, does not reflect upon the correctness of the principle involved, nor does it detract from the value of the assessment plan."

Since the issuance of the Detroit report, property owners in New York City have requested (February, 1924,) the Board of Estimate to remove the present elevated railroad from Sixth avenue and to build a subway under that street, and have agreed to submit to a special assessment of the entire cost of condemning the elevated railroad and building the subway, estimated at \$25,178,973. The property owners believe they will receive back in increased values far more than the improvement will cost them. The city, on the other hand, will be able to build the improvement without any expense to the city and in addition will receive increased taxes upon the properties when the values rise. (Philadelphia Real Estate Board Magazine, February, 1924. See Appendix "A" for complete article.)

VII.

WHAT ARE THE ADVANTAGES OF BUILDING AND FINANCING SUBWAYS BY SPECIAL ASSESSMENT?

"There are some advantages in the use of special assessments to provide for the cost of subways. The

contractor is required to agree that he will look to the special assessment funds only for the payment of the amount due him. (Sections 73 and 90, Local Improvement Act.) If the amounts assessed against private property for benefits are not sufficient for the payment of the entire cost of the construction, the balance of such cost may be assessed against the city as public benefits. This public benefit is not a debt unless the city issues bonds to take care of the payment of such public benefits judgments. (*People v. C. & A. R. R.*, 253 Ill. 191, 195.)

"It would undoubtedly be lawful to use the existing traction fund and the net proceeds of the operation of the system or the net proceeds of the rent paid to the city by a licensee, for the payment of such public benefits. The remainder, if any, of such public benefits could be paid in installments by appropriations in the annual appropriation ordinance.

"One of the chief difficulties in any plan for the issuance of street railway certificates under the existing law is the necessity of avoiding the creation of a lien on any existing property or asset of the city.

"The matter of financing extensions, therefore, presents serious difficulties. The special assessment method seems to afford a method for securing extensions without encountering these difficulties.

"Extensions of an existing system present even a stronger case of a local improvement than the original construction, because these extensions afford new facilities to communities not heretofore provided therewith, and the local nature of such improvements is more clearly manifest." (Sexton's memorandum brief.)

VIII.

INCIDENTS NECESSARY TO BE CONSIDERED IN A PLAN TO BUILD SUBWAYS BY SPECIAL ASSESSMENT.

"There are certain important questions of procedure which require at least brief reference if it be determined that a subway is to be constructed for the use of existing street and elevated railway companies.

"It will in such case be essential for the maintenance of a special assessment proceeding that it should be shown that the tunnel will be so used. This will involve the negotiation of a contract with the existing

transportation companies, or some of them, so that when the case comes on for hearing benefits may be predicated upon a definitely ascertained character of use and not on mere conjecture. Of course if it be determined that the municipality is to operate its own conveyances through the subway, it will also be necessary to show that the necessary proceedings have been had to authorize and insure such municipal operation.

"It is also necessary to bear in mind the provisions of the statute that the ordinance must describe the nature, character and locality of the improvement. For the successful maintenance of a special assessment proceeding the details of the plan must be worked out with much particularity of detail and the statutory procedure must be strictly complied with." (Sexton's memorandum brief.)

APPENDIX "A."

NEW YORK PROPERTY OWNERS OFFER TO PAY FOR SUBWAY.

New York property owners along Sixth avenue, from the Battery to Fifty-ninth street, are prepared to solve their transit problems by paying for the entire cost of removing the Sixth avenue elevated railway, and constructing a subway along the route.

The properties along the route will be tremendously increased in value, it is believed, by the change from an elevated to an underground system. The proposed subway would connect with the new Washington Heights subway. Borough President Julius Miller has submitted the plans to the Board of Estimate.

Owners of more than \$20,000,000 worth of property signed a petition, expressing their willingness to defray the entire cost of the improvement. When Borough President Miller outlined the plan to the property owners, some of the largest of them endorsed the project immediately. Many more property owners are only waiting for meetings of their boards of directors before signing the petition also.

Assessed value of all property along the route is about \$260,000,000. The noisy and unsightly elevated structure prevents these properties from increasing in value as rapidly as would otherwise be the case, it is held.

EXPECT COST BACK BY VALUE INCREASE.

If the plan goes through, the property owners believe they will receive back, in increased values, far more than the improvement will cost them. The city, upon the other hand, will be able to build the improvement free of cost, and in addition will receive increased taxes upon the properties when the values rise.

It is estimated the cost of removing the Sixth avenue elevated system, through condemnation proceedings, would be about \$5,178,973. The construction cost of the new subway, with four tracks along the route, is estimated at \$20,000,000.

The assessment, to be spread over a period of ten years, would amount to about one per cent of the assessed value of the property a year, according to Mr. Miller. He said that property owners for that small assessment, would receive in return a new four-track subway, bringing new life and business to Sixth avenue, and a new street, unobstructed by the elevated, which, he thought, could easily be developed to the same degree as Fifth avenue.

NO LEGAL OBSTACLES.

According to the Borough President, he was assured at a conference with counsel for the Transit Commission, that there were no legal obstacles in the way. Under the Rapid Transit Act the city may assess the abutting property owners for the improvement, provided the Legislature approves the new construction, which must first be authorized by the Board of Estimate.

The Board of Estimate was asked by President Miller to authorize the Corporation Counsel to draw a bill for presentation to the Legislature. The property interests which are behind Borough President Miller in this matter have backed him in numerous other plans for traffic relief. He explained that an opportunity had now presented itself for the city to build a new subway without cost to itself, and to remove without expense to the city one of the worst traffic obstructions in Manhattan.

The Borough President's communication to the Board of Estimate follows:

For the purpose of improving the traffic conditions on Sixth avenue, Borough of Manhattan, I desire to

present for the consideration of the Board of Estimate the question of removing, in its entirety, the Sixth avenue elevated railway structure from its beginning at Trinity Place and Greenwich street to its connection with the Ninth avenue railway at Fifty-third street and to provide in place thereof a subway on Sixth avenue, the cost of which shall be met by assessment upon the abutting property.

With this in view I would request that the Board of Estimate authorize the Corporation Counsel to prepare for submission to the next Legislature a bill giving the city the necessary authority to condemn the entire Sixth avenue elevated railway and to assess the cost thereof, together with the cost of the removal of the structure, in accordance with the provisions of Section 247 of the Greater New York charter. In order that the traveling public may not be inconvenienced by the removal of the elevated railway, it should be expressly understood that title to the Sixth avenue elevated railway shall not vest in the city until substitute facilities have been provided.

I would further recommend that the Board of Estimate request the Transit Commission to take the necessary steps to provide a subway on Sixth avenue, the cost of which is to be met by assessment upon abutting property, as provided in Section 37, Subdivision 3 of the Rapid Transit Act, which states that the Transit Commission with the approval of the Board of Estimate shall have power to determine whether all or any, and if any, what portion of the cost of expense necessary to be incurred shall be assessed upon property benefited thereby.

Further, that the subway on Sixth avenue be so laid out and constructed as to form an integral part of the proposed west side subway.

Under this plan, the city will be put to no expense whatever for either the removal of the elevated structure or the construction of the subway, which will take the place of the elevated railway.

An examination of the assessed value of the property abutting the Sixth avenue elevated structure shows same to be approximately \$260,000,000. From the figures published by the Transit Commission, the tangible property value of this elevated structure is approximately \$5,125,636. From the State Tax Commission

the franchise, or intangible property value of this railway is fixed at approximately \$53,337. It is estimated that a two-track subway on Sixth avenue from Fifty-ninth street to the Battery would cost about \$12,000,000, and a four-track subway about \$20,000,000.

COST OF REMOVAL NO HARDSHIP.

It is obvious that if the Sixth avenue elevated is removed the cost of the improvement will not in any sense be a hardship upon anyone, but, on the contrary, will not only enhance the property values along the route of the railway, but will also bring a very substantial return to the city by way of increased taxes.

LIST OF PROPERTY OWNERS.

The petition of the property owners for the improvement, with some of the signers, follows:

	Assessed Value
32d to 34th streets, Gimbel Brothers.....	\$12,000,000
736-44 6th avenue, Apex Leasing Co., Inc....	3,225,000
"Hippodrome," 6th avenue 43d street, Realty Co.; east side 43d street to 44th street, by Clarke G. Dailey.....	2,400,000
788-790-792 6th avenue, Lewis & Conger, by E. V. Lewis, Pres.....	500,000
778-780 6th avenue, Will Rafel.....	335,000
737-45 6th avenue, Unity Fee Co., Inc.....	650,000
771 6th avenue, Corsican Realty Co.....	155,000
821-9 6th avenue, Manhattan Fee Co., Inc....	339,000
440-4 6th avenue, Southern Leasing Co., Inc..	182,000
841 6th avenue, Richard Lydon.....	49,000
843 6th avenue, Marie J. Lydon.....	38,000
845 6th avenue, Cornelia R. Boyle.....	38,000
849 6th avenue, Marie J. Lydon.....	57,000
838 6th avenue, Henry A. Koelsch.....	58,000
837 6th avenue, Jules Baily.....	53,000
840 6th avenue, Lucia W. Sears, per Walter J. Sears	58,000
114-116 6th avenue, Enrico Fasani.....	85,000
62 6th avenue, Vincent Pepe.....	20,000
106 West 3d street, Vincent Pepe.....	15,000
635-643 6th avenue, William Brinz.....	338,000

662-664 6th avenue, The Sperry Realty Co., by W. J. McKee, Treas.....	198,000
625-627 6th avenue, J. Herschmann.....	260,000
660 6th avenue, H. Jantzen Shoe Co., per H. Jantzen, Pres.	86,000
796 6th avenue, Louis Carreau.....	51,000
798 6th avenue, Sarah C. Clarke, by Louis Carreau, Agent	48,000
806 6th avenue, Cyrille Carreau.....	52,000
666 6th avenue, Agnes M. Peck.....	62,000
689 6th avenue, J. Arthur Fischer.....	76,000
637 6th avenue, John E. Meyer.....	74,000
647 6th avenue, Jas. O'Brien.....	79,000
642 6th avenue, S. May, E. E.....	75,000
691-693 6th avenue, Giovanna P. Maien, P. H. Main, Attorney	156,000
71-73-75 6th avenue and 156 Waverly Pl., George H. Kendall.....	90,000

"There is no question," President Miller said, "that the Legislature has the power to take away from the railway company what it has given if the railway company is compensated for what is taken away. This method provides for the compensation of the railroad company, for its property and for the value of its franchise. Many people are under the impression that the Sixth Avenue Elevated and its franchise are of great value. But the records of the Transit Commission and the State Tax Commission show that is not correct. Information has just come to me that the Sixth avenue branch of the railroad company has been running without a profit for some time. Therefore, it would appear that its franchise value cannot be great.

"If the finances of the city at this time will not permit the building of the subway, and if relief from traffic congestion can be brought about at the earliest possible moment by the elevated removal, it is incumbent upon us to replace the elevated structure as soon as possible with a subway. And if we are to undertake the building at this time, it is absolutely necessary that it should be done by assessment.

"Ordinarily an assessment for such a project might be somewhat burdensome on abutting property owners, but Sixth avenue is so located that for the abutting property owners to pay the cost would not present any undue hardship. The improvement would almost im-

mediately result in great benefit to the property owners through the rise in property value.

PROPERTY VALUES STIMULATED.

“Our plans to remove the spur of the Sixth avenue Elevated from Fifty-third to Fifty-ninth street has already had the effect of stimulating property values on that part of Sixth avenue. Reports coming to me indicate that sales are being made in quick succession by the owners of property abutting on that section of Sixth avenue. Consider the rest of Sixth avenue. Why, it is difficult to name a single new building that has been erected on Sixth avenue in recent years.

“There can be no question that as far as the condemnation of the elevated structure is concerned it should go beyond the abutting property owners to other owners in the area affected. And it is possible that the assessment at some later date would be more widely spread out by the city.

“Some means of relieving traffic congestion must be found. If the plan which I have transmitted to the Board of Estimate is not adopted, it will be necessary to revert to the plan now before the Board of Estimate, which provides for the relocation of the elevated columns from the roadway, to the sidewalks of Sixth avenue.” (Philadelphia Real Estate Magazine, February, 1924.)

Attached to Preceding Opinion of Francis X. Busch.

Power of the City of Chicago to Compel Street Railway Company to Remove Its Tracks to the Center of Widened Streets.

March 4, 1924.

MR. JOHN J. SLOAN, President, Board of Local Improvements.

Dear Sir:

I have before me your letter of the 18th inst., together with what purports to be a draft of an ordinance submit-

ted by Mr. Charles M. Haft, attorney for the Chicago City Railway Co., calling for the re-location of the tracks of that company on East 22d street, as and when widened, at the expense of the City.

This department has had several conferences with Mr. Haft on this subject, and particularly with reference to the expense incident to the re-location of said tracks. Mr. Haft has insisted that said expense should be borne by the City of Chicago.

Mr. Haft contends that under the 1907 franchise ordinance, the City is obligated to bear the expense of removing said tracks to the center of the widened street, and in support of his position cites a number of Supreme Court decisions none of which do we consider at all in point. He calls attention to the case of *Chicago City Railway Co. v. City of Chicago*, 90 Ill. 573, decided in 1878, which holds that the railway company's rights in the street were subject to assessments for benefits derived from the widening of State street upon which the company ran one of its lines. We cannot see where this case has any application to the question under discussion.

He also calls our attention to the case of the *City of Chicago v. O'Brien*, 111 Ill. 532, which holds that the City did not have the constitutional power to require the owner of premises to keep sidewalks and gutters in front of his premises free from snow or ice, because the sidewalk was a part of the public highway, and the City could not shift its burden of keeping the sidewalks and highways free from snow and ice to a private individual under the exercise of the police power. This case has not the slightest application to our question.

The case of *City of Chicago v. Jackson*, 196 Ill. 496, which Mr. Haft also cites, has no bearing on this question. There it was held that while a municipal corporation had the right to change the grade of a street incident to track elevation, and incidentally damage private property, the property owner was protected by Section 13 of Article 2

of the Constitution, and must be recompensed to the extent of his damage. In this case there was no contractual relation existing between the City and the private property owner. In other words, he did not hold his land under a franchise from the City.

In the case of *Sanitary District of Chicago v. Chicago & Alton Railroad Co.*, 267 Ill. 252, also cited by Mr. Haft, it was held that while the Sanitary District was organized under the police power of the state for the purpose of protecting the public health, a railroad company was not obliged to construct, at its own expense, a bridge over an artificial channel which the Sanitary District proposed to construct across the railroad right-of-way, the cost of building such bridge being properly allowed as damages in a proceeding by the district to condemn the right-of-way for such channel. Here again, the Chicago & Alton Railroad Company was not operating under a franchise from the Sanitary District.

Practically the same situation arose in the case of the *East Side Levee and Sanitary District v. Mobile & Ohio R. R. Co.*, 279 Ill. 319, also cited by Mr. Haft. It was held there that while the Sanitary District had the right to exercise the power of eminent domain, it could not take or damage private property without making just compensation therefor.

Mr. Haft urges that because the ordinance does not specifically require the company to pay the cost of such work, it was the intention of the parties at the time the ordinance was accepted that the City would pay the cost of such removal of tracks. He contends that because the ordinance contains a provision requiring the company to lay and maintain its tracks so as to conform with the grade of the street as the same is "or from time to time hereafter shall be established," the inference is that, as to re-locating tracks in a different part of the street which does not involve a different grade, the City would reimburse the company for the cost of such work.

Our contention is that under the police power the City can require the traction companies to relocate their tracks in the center of the streets which are widened for the purpose of facilitating the movement of traffic. The fact that there is no specific provision in the ordinance, which constitutes a limited contract between the City and the traction company, does not in our opinion, affect this police power, which is a continuing and inalienable right of the City.

To support this proposition we realize it will be necessary to show that, for the safety and welfare of the public, where streets are widened, it is essential that street car tracks be placed in the center of the widened streets. Our engineers are of the opinion that the public generally would best be served by the street car tracks being removed to the center of the widened street; that if the street car tracks were to remain in their present location, after the street is widened, automobile traffic could not be regulated as effectively; that pedestrians' safety and welfare would best be served by the removal of the tracks to the center of the widened streets. We appreciate these are questions of fact which must be supported by testimony of competent witnesses.

We call your attention to Paragraph four (4) of Chapter 131A of Illinois Revised Statutes dealing with the subject of street railroads, which reads as follows:

Every grant to any such company (street railroads) of a right to use any street, alley, road, highway or public ground shall be subject to the right of the proper authorities to control the use, improvement and repair of such street, alley, road, highway or public ground, to the same extent as if no such grant had been made, and to make all necessary police regulations concerning the management or operation of such railroad, whether such right is reserved in the grant or not.

Under the 1907 ordinance the City specifically reserves the right of exercising any police power which it would have possessed or enjoyed had the ordinance not been granted.

Section 35 of the ordinance, which deals with this subject, reads as follows:

Nothing in this ordinance contained shall be construed as depriving the said City of the right of exercising any police power which it would have possessed or enjoyed had this ordinance not been granted.

The enumeration herein of special requirements and specific regulations shall not be taken or held to imply the relinquishment by said City of its power to make other requirements or regulations, and the said City hereby expressly reserves the right to make all regulations which may be necessary to secure in the most ample manner the safety, welfare and accommodation of the public, including among other things the right to pass and enforce ordinances to protect the public from danger or inconvenience in the management and operation of street railways throughout the said City and the right to make and enforce all such regulations as shall be reasonably necessary to secure adequate and sufficient street railway accommodations for the people, and insure their comfort and convenience.

The following cases of the Supreme Court of Illinois bear out our contention that, under the police power, the City can compel the traction companies to remove their tracks to the center of the streets, as and when widened.

In the *Chicago & Northwestern Railway Company v. City of Chicago*, 140 Ill. 309, there was involved the question as to compensation for property taken and damaged by the City of Chicago for the extension of West Taylor street across the right of way of certain railway companies. The Circuit Court found that the just compensation to be paid by the City for the extension of the street across the tracks was one (\$1) dollar. The street was sixty-six (66) feet wide. The railway companies appealed. Here the Supreme Court said, page 315:

The question is whether, in a case where a city institutes a condemnation proceeding to open or extend a street across a railroad already constructed, the company owning such railroad is entitled to be allowed, as a part of its just compensation, the amount of its ex-

penses in construction and maintaining the street crossing. * * *

Page 317:

The only question is, whether the appellant is bound to construct and maintain the crossing without compensation, or whether it should have been awarded damages for the expense of such construction and maintenance by the judgment of the court below.

Government owes to its citizens the duty of providing and preserving safe and convenient highways. From this duty results the right of public control over public highways. Railroads are public highways, and in their relations as such to the public are subject to legislative supervision, though the interests of their shareholders are private property. Every railroad company takes its right of way subject to the right of the public to extend the public highways and streets across such right of way. (*Railway Co. v. Railway Co.*, 30 Ohio St. 604.)

In the separate opinion in *C. & A. R. R. Co. v. J. L. & A. Ry. Co.*, 105 Ill. 388, it was said: "Unless, therefore, every railroad corporation takes its right of way subject to the right of the public to have other roads, both common highways and railways, constructed across its tracks whenever the public exigency might be thought to demand it, the grant of the privilege to construct a railroad across or through the State would be an obstacle in the way of its future prosperity of no inconsiderable magnitude."

Page 323:

Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking or damaging without just compensation of private property, or of private property affected with public interest. (*R. R. Co. v. County Commissioner*, 79 Me. 386.) * * *

Page 325:

In *T. P. & W. R. W. Co. v. Deacon*, 63 Ill. 91, we said: "The state has reserved to itself the power to enact all police laws necessary and proper to secure and protect the life and property of the citizen. Prominent among the rights reserved, and which must inhere in the State, is the power to regulate the approaches to,

and the crossing of public highways, and passage through cities and villages, where life and property are constantly in imminent danger by the rapid and fearful speed of railway trains. The exercise of their franchises by corporations must yield to the public exigencies and the safety of the community.”

We call your attention to the case of the *City of Chicago v. The Chicago Union Traction Company*, 199 Ill. 259. In this case the City instituted an action against the street car company to recover fines provided by an ordinance for failure of the street car company to remove dirt and other accumulations lying on the surface of the street between the rails. This case was decided in 1902. The traction company was operating under an old ordinance which contained no provision for the removal of such dirt.

In the justice court, where the case was originally tried, the traction company was adjudged guilty and fined one hundred (\$100) dollars. The traction company appealed to the Criminal Court, which found the traction company not guilty. The City sued out of a writ of error to the Supreme Court. In reversing the judgment of the Criminal Court and remanding the cause, the Supreme Court said in part as follows:

Page 265:

“It is clear the city could not, by virtue of the police power or otherwise, require the defendant in error company to clean and repair the street if the real purpose is merely to shift the public burden from itself to the company. (Citing *Gridley v. City of Bloomington*, 88 Ill. 554, and *City of Chicago v. O'Brien*, 111 Ill. 532, referred to by Mr. Haft) * * *.”

Page 266:

The doctrine of these cases is unquestionably sound, but we do not assent to the view pressed upon us by counsel for the defendant in error company that they are decisive of the validity of the ordinance here under consideration. The defendant in error company does not occupy the position of the owner of property abutting upon a street. * * *

The defendant in error company has, however, been granted a special privilege to occupy the street with its rails, girders, poles or posts and wires, etc., and to operate its cars along its tracks so laid in the street. Horsemen and drivers of vehicles must yield the right of passage to its cars along and upon its tracks in the streets, as we have explained in *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67. It has acquired privileges in the street which other persons, natural or artificial, do not possess. It actually occupies a portion of the street in a manner which would not be permitted without the aid of an ordinance. It has a qualified right of occupancy, and to that extent a property interest, in a portion of the street, and is authorized to transact its business for its own gain on the public street. It sustained a relation to the street and to the city entirely distinct from that of an abutting property owner, and it does not follow that the defendant in error company can not be required to clean that portion of the street occupied by its tracks simply because an abutting property owner cannot be required to clean that portion of the sidewalk or street which is in front of his premises. The permission or license given the defendant in error company to use the street did not operate to deprive the city of the general power of control over the street delegated to the municipality by the General Assembly of the State. The license and privilege enjoyed by the defendant in error company are in subordination to the general power so residing in the city.

Page 268:

The privilege enjoyed by the defendant in error company to maintain its railway in the street and operate its cars thereon is to be exercised in the interest of the public—it was to serve the public that the privilege was granted to it. Its business and property are impressed or affected with a public use. It may therefore be subjected to municipal regulations of a greater scope, in the interest of the public at large, than that of a railroad company exercising its franchises on its own road-bed. (*Cape May Street Railway Co. v. Cape May*, 59 N. J. L. 396; *Charlotte, etc., Railroad Co. v. Gibbs*, 142 U. S. 386.) Ordinances have been upheld which required street railway companies to keep the street between the rails of their tracks in repair, and which regulated the

common use of the streets for street railway and ordinary travel (*North Hudson Railroad Co. v. Hoboken*, 12 Vroom, 71); to make the railroad tracks of street railway companies located in a street to conform to the requirements of the ordinance, so as to enable wagons, carriages and other vehicles to pass over tracks without inconvenience or danger (*North Chicago City Railway Co. v. Town of Lake View*, 105 Ill. 183); to remove snow from the street (*Broadway Railroad Co. v. Mayer*, 49 Hun 129);

Page 269:

It is urged the ordinance granting license to lay the tracks and operate the street railway in Kinzie Street constitutes a contract between the city and the traction company, the obligations whereof cannot be impaired by any ordinance subsequently enacted, and we are invited to consider whether the provisions of the ordinance so granting permission to occupy the street with the tracks of its railway, and operate its cars on such tracks, do not relieve the defendant in error company of the burden sought to be laid upon it by the ordinance here endeavored to be enforced. On the other hand, counsel for the city insist the latter ordinance requires the company to do no more than it is bound to do by a fair and reasonable construction of the terms and provisions of the former ordinance granting authority to the defendant in error company to occupy the street with its tracks.

The city, as the representative of the State, is invested with power to enact and enforce all ordinances necessary to prescribe regulations and restrictions needful for the preservation of the health, safety and comfort of the people. The exercise of this power affects the public and becomes a duty, the performance whereof is obligatory on the city. The city could not, by the terms and conditions of the former ordinance, deprive itself of this power or relieve itself of this duty, nor could the defendant in error company, by any contractual terms of an ordinance, exempt itself from the proper and reasonable control of the municipal authorities in matters affecting the health, safety or comfort of the people. 'No contract can be made which assumes to surrender or alienate a strictly governmental power which is required to continue in existence for the welfare of the public. This is especially true of the police power,

for it is incapable of alienation. It cannot be doubted that a company which secures the right to use the streets of a municipal corporation takes it subject to the police power resident in the State as an alienable attribute of sovereignty.' Elliott on Roads and Streets, p. 801."

An important opinion bearing on this question is that of the *People v. The Metropolitan West Side Elevated Railway Company*, 285 Ill. 246. In this case the state's attorney of Cook County, on behalf of the People, filed a bill in chancery against the Metropolitan West Side Elevated Railway Company, alleging that the company had built obstructions to navigation in the south branch of the Chicago river, and praying that the company be ordered and directed, at its own expense, to remove said obstructions. The bill was filed in November, 1907. In February, 1909, the Chicago City Council passed an ordinance ordering and directing the Metropolitan Company to make certain changes in its bridge. In April a supplemental bill was filed by the state's attorney alleging this ordinance. The Metropolitan Company in its answer alleged that the bridge was lawfully constructed under authority granted by the City of Chicago by ordinance adopted in 1892, with the approval of the Commissioner of Public Works, and the permission and approval of the Secretary of War; that the right of the Metropolitan Company to maintain said bridge was a vested right, and that the State was estopped to compel its alteration or removal. The issues raised by the pleadings were referred to a master, who, after hearing voluminous evidence, reported to the chancellor recommending that the bill be dismissed. The complainant filed objections to the master's report. The chancellor overruled all of the exceptions and under a decree as recommended by the master dismissed the bill for want of equity. The complainant prosecuted the appeal to the Supreme Court, which in reversing the decree of the master, and remanding, with directions to grant the relief prayed for, said:

Page 252:

The principal questions presented for determination are: * * *

(2) The construction of the bridge having been authorized by the proper authorities, does it remain a lawful structure even though it subsequently became an unreasonable obstruction to navigation?

(3) Are the State and the City of Chicago estopped to have the obstruction removed? * * *

Page 257:

It is the contention of appellee, the Metropolitan Company—and that appears to have been the view of the chancellor—that the bridge having been built by authority of Law, State and Federal, pursuant to permits of the authorized public officials, it is a lawful structure and the Metropolitan Company is vested with the irrevocable right to maintain it as originally constructed; that by accepting and complying with the terms of the ordinance of April 7, 1892, the right to build and maintain the bridge as then constructed became a contract, by virtue of which the Metropolitan Company has an easement in perpetuity in the land upon which the west abutment of its bridge stands, and that the State cannot, in violation of the contract, require its removal. Conceding the bridge as originally built was a lawful structure and did not unreasonably interfere with navigation, the question arises as to the right and power of the authorities to require its removal or alteration when, on account of changed conditions, and the increased demands of commerce and navigation, it becomes an unreasonable interference with traffic on the river.

Page 260:

The Metropolitan Company and the public, for the purpose of navigation, had mutual rights in the Chicago river at the point where the bridge crossed the river. Observing those rights, the bridge was constructed to accommodate the needs of the Metropolitan Company and to not seriously affect navigation. Because of increased commerce in the Chicago river, together with the increased size of the boats used in such commerce, the bridge has become a hindrance or unreasonable obstruction. While this was not so at the time the bridge

was erected, changed conditions have made it so. It is well established by the authorities herein cited that the duty of a railroad company to restore a stream or highway which it crosses by the line of its road is a continuing duty, and that if, by the increase of population or other causes, the crossing becomes inadequate to meet the new and altered conditions of the country, it is the duty of the railroad company to make such alterations as will meet the present needs of the public. This is true whether or not the stream crossed is navigable. (Citing numerous cases.)

Page 262:

The police power of the State or Federal government cannot be contracted away or destroyed by compromise, and neither the State nor the city can be estopped to exercise such power. (*Northern Pacific Railway Co. v. Minnesota*, 208 U. S. 583; *City of Chicago v. O'Connell*, 278 Ill. 591.) The act of the legislature under which the Metropolitan Company was created required it to restore the river to its former state and maintain its bridge so as not to unnecessarily impair the usefulness of the river. The ordinance of the city of Chicago passed April 7, 1892, authorized the construction of the bridge, provided the same should not be so constructed as to unnecessarily obstruct navigation or drainage. Conditions with reference both to navigation and drainage have greatly changed since the first bridges across water-courses were built in this State. What formerly were sufficient to answer the needs and requirements of the time when built are in many instances now inadequate. To hold that if such structures were of sufficient size and character when built they cannot now be ordered removed or changed to comply with present requirements would arrest progress and thwart advancement.

The city of Chicago exercised the authority of the State in authorizing the bridge to be built, but it could not and did not grant authority to either build or maintain a structure that would be an unnecessary obstruction to navigation. (Citing cases.) This suit is not an attempt to oust the Metropolitan Company from the exercise of any franchise. The purpose of the suit is not to deny the company the privilege of crossing the river with its railroad, but to require it to so readjust its

structure that the enjoyment of its right shall not seriously and unreasonably obstruct or interfere with the public in the enjoyment of the right of navigation, which is as important as the right of the public to cross the river. The Metropolitan Company knew when it built its bridge that it must not unreasonably obstruct the right of navigation and was bound to know that this was a continuing duty which might necessitate changes and alterations in its structure. The law never contemplated or intended that the grant of authority to a railroad company to build its road over a navigable stream of water gave such company the right, if its bridge when built was not an unreasonable obstruction to navigation, to maintain it in that condition, notwithstanding by reason of changed conditions and increased facilities for commerce the structure became a material and unnecessary obstruction. Neither the statute of this State nor the ordinance of the city of Chicago purports to grant such right, and if they did, the Metropolitan Company could acquire no vested right under a grant of power, which the authorities could not lawfully make. (See also the *State Public Utilities Commission v. The City of Quincy*, 290 Ill. 360.)

Federal courts have many times considered the constitutionality of police regulations involving similar questions. The Circuit Court of Appeals, Seventh Circuit, in the case of *City of Chicago v. New York, C. & St. L. R. Co.*, 216 Fed. Rep. 735 (decided April 14, 1914), said on the subject of police power:

Page 738:

The other element in the 1909 ordinance is the exercise of police power. Though a railroad company may insist upon holding its perfected right of way latitudinally and longitudinally, a city in the interest of the public, if authorized by the state so to act, may enforce a shifting or an elevation of the tracks within the limits of the right of way upon or across a street. *C. B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, 41 L. Ed. 979; *C. I. W. R. Co. v. Connersville*, 218 U. S. 336, 31 Sup. Ct. 93, 54 L. Ed. 1060, 20 Ann. Cas. 1206; *Grand Trunk W. R. Co. v. South Bend*, 227 U. S. 544, 33 Sup. Ct. 303, 57 L. Ed. 633, 44 L. R. A. (N. S.) 405.

The Supreme Court of the United States in the case of *Grand Trunk Western Ry. Co. v. South Bend*, 227 U. S. 544, in unequivocal language, lays down the rule that, under the power to regulate, a municipality might compel a public utility company to remove its tracks from the side to the center of the street. In that case the court said:

Page 553:

And while the franchise to lay and use a double track was a contract which could not be impaired, yet, as the police power remained efficient and operative, the municipality had ample authority to make regulations necessitating changes of a nature which could not have been compelled if the grant had been from it as a private proprietor. The city could, therefore, legislate as to crossings, grades, character of rails, rate of speed, giving of signals and the details of operating track and train, regulating the use of the franchise, and preserving the concurrent rights of the public and the company. And, as in the viaduct cases, it might require these tracks to be lowered or elevated (*Chicago, B. & Q. R. R. v. Nebraska*, 170 U. S. 57) or—the franchise, and not the particular location, being the essence of the contract—the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center of the street. *New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453; *Macon &c. R. R. v. Mayor*, 112 Georgia, 782; *A. & B. Ry. v. Cordele*, 128 Ga. 293, 296; *Snouffer v. Cedar Rapids & M. C. Ry. Co.*, 118 Iowa, 287 (5).

In *Cincinnati, Indianapolis and Western Railway Co. v. City of Connersville*, 218 U. S. 336, syllabus No. 1 reads as follows:

A railway corporation accepts its franchise from the State subject to the condition that it will conform, at its own expense, to any regulations as to the opening or use of streets which are reasonable and proper and have for their object public safety and convenience and which may, from time to time, be established by the municipality, within whose limits the company operates, proceeding under legislative authority.

In the *City of Baltimore v. Baltimore Trust & Guarantee Co.*, 166 U. S. 673, the Supreme Court said:

Page 684:

If it be said in this case that the city had already regulated the use by prescribing that there should be two tracks, the answer is that this power of regulation is a continuing power; it is not exhausted by being once exercised, and so long as the object is plainly one of regulation, the power may be exercised as often as and whenever the common council may think proper; the use of the street may be subjected to one condition today and to another and additional one tomorrow, provided the power is exercised in good faith and the condition imposed is appropriate as a reasonable regulation, and is not imposed arbitrarily or capriciously. *New Orleans Co. v. Louisiana Light Co.*, 115 U. S. 650, 672; *N. Y. & N. E. Railroad v. Bristol*, 151 U. S. 556, 567.

In the case of *New Orleans Gas Company v. Drainage Commission*, 197 U. S. 453, the Supreme Court said:

Page 458:

It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the street of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. * * *

There was nothing in the grant of the privilege which gave the company the right to any particular location in the streets; it had the right to use the streets, or such of them as it might require in the prosecution of its business. * * * Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the State to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety. * * *

Page 461:

This right of control seems to be conceded by the learned counsel for the plaintiff in error, in so far as

it relates to the right to regulate the use of the surface of the streets and it is recognized that the users of such surface may be required to adapt themselves to regulations made in the exercise of the police power. * * *

Page 462:

The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*.

If the City by ordinance provided for the payment of the cost of all or a part of the work incident to the removal of tracks to the center of streets, as widened, out of the corporate fund, in our opinion a taxpayer might lawfully object for the reasons stated by the Supreme Court of New York in the case of *In re Deering*, 93 New York 362. In that case the Supreme Court said:

The learned counsel for the city fails to satisfy us that any authority exists for imposing upon the owner of adjacent property, expenses incurred by the gas company in removing and replacing its pipes. These things, were not made necessary by the construction of any sewer or culvert, and consequently the ordinances of the city, as cited by him, have no application. For aught that appears here, although authorized to lay its pipes through the public streets (Laws of 1848, chap. 37, Sec. 19), the company took the risk of their location and should be required to make such changes as public convenience or security requires, and at its own cost and charge.

We are attaching hereto a copy of a memorandum prepared and dated January 18, 1924, containing excerpts from the 1907 ordinance, and opinions of former corporation coun-

sels, which throws some light on the subject. We call your attention particularly to the very able opinion of Judge Howard B. Hayes, which was approved by the then Corporation Counsel, Mr. E. J. Brundage.

In view of these decisions, it is our opinion that if we can establish sufficient facts to show that the public safety and welfare require the removal of the tracks to the center of the streets as and when widened, under the police power, the City can compel the traction companies to remove the tracks at their own expense.

Respectfully submitted,

PHILIP J. McKENNA,
Attorney, Board of Local Improvements.

EMMET TRAINOR,
Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Proposed Repeal of Track Elevation Ordinance and Enactment of Substitute.

June 25, 1924.

HON. GEORGE M. MAYPOLE, Chairman, Committee on Track
Elevation.

Dear Sir:

We return herewith two proposed ordinances which were sent to us with your letter of June 11th. One of the proposed ordinances purports to repeal an ordinance passed by the City Council on June 25, 1906, authorizing and requiring the Pittsburgh, Fort Wayne and Chicago Railway and its lessee, the Pennsylvania Company, the Cummings branch of

the Pittsburgh, Fort Wayne and Chicago Railway, the Lake Shore and Michigan Southern Railway Company, the Baltimore and Ohio Railroad Company, the South Chicago Railroad Company, the Chicago and Western Indiana Railroad Company, the Chicago, Rock Island and Pacific Railway Company and the Chicago, Lake Shore and Eastern Railway Company, respectively, to elevate the plane of certain of their railway tracks in the City of Chicago. The other proposed ordinance purports to repeal an ordinance passed by the City Council on July 1, 1912, authorizing and requiring the South Chicago Railroad Company to elevate the plane of certain of its railway tracks in the City of Chicago.

The ordinance of June 25, 1906, was accepted in writing within sixty days from the passage thereof by all the companies named therein except the South Chicago Railroad Company, which never accepted said ordinance. Said ordinance, however, expressly provides that, "The failure or default of any of said companies to file such agreement or agreements within the time herein limited shall not avoid or impair any of the rights hereunder of the several railway and railroad companies which shall have filed their agreement, or agreements, as hereinbefore provided, so long as they shall perform the matters and things expressly required of them by this ordinance." The ordinance of July 1, 1912 (which was made necessary by the failure of the South Chicago Railroad Company to accept the ordinance of June 25, 1906), was accepted in writing by said South Chicago Railroad Company on August 27, 1912.

In your letter you ask us to advise you concerning the legality of the proposed repealing ordinances, if passed, and then state the purpose of the committee and the object sought by the proposed ordinances, as follows:

"According to the provisions of these ordinances (of June 25, 1906, and July 1, 1912) the grades of the subway floors which are parallel and adjacent to each other were at different elevations. This made the construction of the subways impracticable.

"It is the purpose of the Committee on Track Elevation to have these ordinances repealed so that another

ordinance may be drafted which will be practicable and acceptable to both railroad companies.”

Said ordinances of June 25, 1906, and July 1, 1912, belong to the class commonly known as contract ordinances. Such ordinances, although passed by the City Council under its legislative authority and in the usual form of legislative acts, become, when accepted by the grantees thereof, complete contracts between the City and such grantees and are mutually binding upon the City and such grantees according to the terms and conditions therein contained. Such ordinances, having been duly accepted, are, therefore, not subject to the legislative power of repeal which exists at all times in the council in respect to the general ordinances of the City, and the obligations created by such ordinance contracts can only be altered, amended or rescinded by the mutual consent of the contracting parties or in accordance with powers of alteration and revocation reserved in the ordinances themselves. *City of Quincy v. Bull*, 106 Ill. 337; *Chicago Municipal Gas Light Company v. Town of Lake*, 130 Ill. 42; *People v. Central Union Telephone Company*, 232 Ill. 260; *People v. Chicago Telephone Company*, 245 Ill. 121; *Murphy v. Chicago, Rock Island and Pacific Railway Company*, 247 Ill. 614.

In *City of Quincy v. Bull*, *supra*, the court, discussing a contract ordinance which granted the defendants the right to use the streets of the City of Quincy for the laying of water pipes, said (pp. 351-352):

“We have found that the city council had power to make this contract for the use of the streets; that it had power to contract for the putting in of the water works; that they could not be constructed without the use of the streets for the purpose,—and, therefore, the power to contract for the water works included, as a necessary incident, the power to contract for the use of the streets for that purpose. The power to make a contract, but not to make a binding one, is unmeaning. Where there is power to make a contract, there is power to make one that shall bind. We see no more to be involved here than the simple law of contract—whether

a municipal corporation may at its will repudiate the obligation of a fair contract which it has made, and which it was authorized to make. The attempt is to take back a grant which the city has made under a contract. The State itself may not revoke a grant it has made. *The city must be bound by the contract and grant it has made, and had authority to make, the same as would an individual.*" (Italics ours.)

In *People v. Chicago Telephone Company, supra*, the court discussed the nature of a contract ordinance permitting the defendant company to erect its poles and wires in public streets, as follows (pp. 134-135):

"In granting to the Chicago Telephone Company a license to construct its poles, wires and other fixtures in the streets and alleys of the town, the board of trustees of the town of Cicero was exercising the power to regulate and control the use of the streets and alleys within the limits of the town which had been delegated to it by the General Assembly. It was exercising a legislative function as a governmental agency of the State, and the grant was made by the town in its governmental and not in its proprietary capacity. (Citing cases.) The grant thus made was a license which, when accepted by the telephone company, became a contract between the town, as a governmental agency of the State, and the telephone company. (Citing cases.) *Neither the town of Cicero nor any other municipality succeeding to its governmental powers over the streets and alleys of the territory then included within the town of Cicero, or any part thereof, had or could have any right to repudiate the contract or take back the grant without the consent of the telephone company; and likewise the telephone company would have no right to repudiate the contract or avoid the obligations imposed upon it by the ordinance without the consent of the governmental agency in control of the streets and alleys in which it desired to continue to maintain and construct its poles, wires and other fixtures.*"

As we understand your letter and the language of the proposed repealing ordinances, the committee does not regard the delay of the companies in complying with the ordi-

nances of June 25, 1906, and July 1, 1912, as wilful breaches thereof nor as indicating the intention of the companies to repudiate their duties and obligations under said ordinances. It seems instead to be the intention and desire of the committee to provide more effectually for the elevation of the same railway tracks by the passage and acceptance of other and different ordinances for such track elevation containing terms and specifications which the committee deems more workable and practical.

We are therefore of the opinion that the proposed ordinances do not accomplish the committee's purpose and should not be recommended for passage. At the same time we beg leave to suggest that the committee's purpose may be accomplished if the companies be called in and negotiations had leading to the passage and acceptance of a new ordinance containing terms and provisions satisfactory to the committee and permitting said tracks to be elevated in a practical and workable manner. Such new ordinance or ordinances may then be substituted for the ordinances of June 25, 1906, and July 1, 1912, and provide for the release and rescission of the obligations contained in such ordinances. In the meantime the City will retain all its rights under the existing ordinances, unless and until such new ordinance or ordinances are passed and accepted, and, if the committee is unable to agree with the companies relative to such new ordinance or ordinances, the City may at any time abandon its passive attitude and insist upon compliance with the terms and provisions of the existing ordinances. Section 8, Paragraph 1 of the ordinance of June 25, 1906, and Section 14 of the ordinance of July 1, 1912, grant to the Commissioner of Public Works of the City the right, power and authority, in event of the failure of the companies or any company to perform the work specified to proceed after due notice to cause such work to be done and to charge the cost thereof to the delinquent company or companies.

In conclusion, we wish to assure the committee that, if the procedure herein suggested shall be adopted, we shall be glad

to assist the committee in the preparation of such new ordinance or ordinances.

Respectfully submitted,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

LEON HORNSTEIN,

Acting Corporation Counsel.

**Approval of Expenses of Traction Companies by
Board of Supervising Engineers.**

July 11, 1924.

HON. R. A. WOODHULL, Chairman, Committee on Finance.

Dear Sir:

The City Clerk has transmitted to this office a copy of an order now pending before the City Council authorizing the Chicago Surface Lines to charge to the "joint account" under the Settlement Ordinances certain items of expenditure for charitable and other purposes, together with the direction of that Honorable Body that we submit our opinion as to whether the items listed in said order may be properly charged to the joint account. Under date of May 7, 1924, the City Council directed the re-reference of this order to the Committee on Finance, where it is now pending. For this reason this opinion is directed to you.

Careful analysis of the items listed divides them into three classes: (1) donations of money to various civic, political and charitable purposes; (2) formal payments out of the funds of the companies to the treasurer of the Chicago Surface Lines for tickets for use over the street railways of the Chicago Surface Lines, which tickets were then distributed

gratuitously to poor persons traveling to the parks and bathing beaches or other public places in the City, in effect a gratuitous distribution of service rather than money to charitable uses; and (3) moneys paid for advertising in various special mediums, *e. g.*, trade union directories, journals or magazines published by civic organizations, etc. The total amount of the items listed is \$43,088.33, and if the same be charged to the "joint account" the portion borne by the City, viz., fifty-five per cent, will amount to \$23,698.58.

Section 25 of the ordinance of February 11, 1907, for the Chicago Railways Company, defines specifically the classes of expenditures that shall be deducted from the gross revenues of the company from all sources in order to determine the divisible net receipts, of which forty-five per cent shall be retained by the company and fifty-five per cent shall be paid to the City, and by a familiar canon of construction such specific enumeration of the deductible items excludes the right to deduct any other class of expenditures. Similar specific provisions are found in the ordinances of February 11, 1907, March 30, 1908, and March 15, 1909, for the Chicago City Railway Company, Calumet and South Chicago Railway Company and The Southern Street Railway Company, respectively. Said Section 25 provides as follows:

"* * * From the gross receipts of the said street railway system and property from all sources and of every kind for the year ending on said thirty-first day of January there shall be deducted for such year:

First: (1) All expenses of operation, including maintenance, repairs and renewals; (2) All amounts contributed during said year and then held in reserve under the provisions of Sections 16 and 18 thereof; (3) All amounts paid out for taxes and assessments levied or imposed upon the real and personal property of the Company, including all capital stock or franchise taxes levied or assessed after the year 1906, but not including any taxes which may by any court be ordered to be levied, assessed or collected after the year 1906 on account of the failure of the Company or any person, firm or corporation owning or having an interest in the said street railways or property, to pay any taxes which

should have been paid for or on account of such street railways or property prior to the year 1907, and not including any sum paid by the Company to the City for City license fees, if any, exacted from the Company, or, its employes; (4) all salaries and expenses of the Board of Supervising Engineers by this ordinance authorized, after the period of 'Immediate Rehabilitation'; and

Second: a sum equivalent to five (5) per centum per annum for said preceding year upon the amount of the cash purchase price which the said City would then be obligated to pay on account of the items specified in subdivisions 1, 2 and 3 of Section 20 thereof, if it were purchasing the property for municipal operation on such thirty-first day of January, interest being adjusted as to items added to such purchase price during said year.

* * *

After the deduction from the gross receipts of the items hereinbefore in this Section provided, the amount remaining shall be considered as the net receipts for such year arising from the operation of the street railway system hereby authorized, and shall be divided between the Company and the said City in the following proportions: *forty-five (45) per cent to be retained by the Company and fifty-five (55) per cent to be paid forthwith by the Company to the said City, crediting thereon all amounts paid out during the preceding year by the Company for license fees, if any, exacted from the Company or its employes.*"

It is obvious that the expenditures which the companies now wish to charge to the joint account do not come within the deductible expenditures mentioned in Section 25 unless they are proper charges to "expenses of operation."

It is a familiar rule of construction, applicable alike to contracts and to ordinances and statutes, that all words used therein should be given their usual and ordinary meanings unless the context demands that they be understood in an unusual sense. Public grants should also be construed strictly in favor of the public, and words used in such grants should not be given unusual or extraordinary meanings contrary to the rights of the public under such grants except where such extraordinary constructions are absolutely necessary to the plain meaning of such grants. We have been unable to find

in any decision of the courts, or any work on the accounting of public utility companies, a definition of the term "expenses of operation" broad enough to include all or even the greater part of the items listed in the order before the council.

The Century Dictionary defines the term *expenses* as "that which is expended, laid out, or consumed; cost or charge," and further defines the term *expend* as follows: "to consume by use; spend by using, as water is expended in mechanical operations." The same dictionary defines the term *operation* as "action; working; active exercise of some specific function or office; power exercised in producing an effect." Applying such general meanings to the expression "expenses of operation" would limit that term to money, labor, material or property consumed or expended by street railway companies in the exercise of their function, the transportation of passengers for hire.

A similar meaning is given to the term *operating expenses* in the following language found in Section 653 of Short on Railway Bonds:

"They (*operating expenses*) are, broadly speaking, those which it is reasonably necessary to incur for the purpose of keeping up a railroad (to which the term is commonly applied) as a going concern, or, as it is sometimes expressed, those which conduce to the conservation of the property."

This definition is adopted and approved in Bouvier's Law Dictionary. The Interstate Commerce Commission in the general instructions accompanying its Uniform System of Accounts for Electric Railways uses the following definition:

"Operating Expenses Defined.—The term operating expenses means such expenses as are necessary to the maintenance and operation of the property used in transportation service (including services incident thereto), the rendering of services, and the collection of revenues in connection therewith."

We are, therefore, of the opinion that Classes 1 and 2, donations of money and service, respectively to uses entirely

unconnected with the operation of the street railway properties and unproductive of any directly beneficial result to the business of the companies are not expenses of operation within any common use of that term, and that such donations cannot be brought within the "expenses of operation" chargeable to the joint account under the terms of the Settlement Ordinances.

This question was the subject of an opinion by the Law Department dated March 31, 1913. The then Mayor, Carter H. Harrison, had transmitted to the Corporation Counsel a request by Bion J. Arnold, Chairman of the Board of Supervising Engineers, for an opinion as to whether the board should "approve the expenditure by the Chicago City Railway Company of a \$1,000 contribution towards the flood sufferers' fund in Ohio and Indiana as a proper charge to the joint account of the Chicago City Railway Company and the City of Chicago under the terms of the 1907 ordinances."

The department, after reviewing the ordinances, came to the conclusion that "neither under the 1907 traction ordinances, nor under the general law, can donations of the character referred to be approved by the Board of Supervising Engineers so far as such expenditures involve charging such amounts to the joint account of the City and Company." (See Opinions of the Corporation Counsel and Assistants, from January 1, 1913, to October 5, 1914, p. 182.)

In that opinion it was recited that "Mr. Arnold personally takes the view that he 'was compelled to tell the Company that I saw no authority for making this contribution under the terms of the ordinances and that the only way that it could be done would be for the Company to make a contribution out of its own fund.' "

It therefore appears that both the Law Department and Mr. Arnold, Chairman of the Board of Supervising Engineers, were of the opinion that no allowance could be made to the companies by the City on account of any contributions to political or charitable organizations. We concur in that opinion.

Class 3, advertising expense, is ordinarily a proper charge to operating expenses and the managing officers would ordinarily have the right to select advertising mediums. It is, however, the plain purpose of the Settlement Ordinances in creating the Board of Supervising Engineers to charge that body with the duty of protecting the City's interests, including the "traction fund," from reckless or improper expenditures by the companies. The board is clothed with complete jurisdiction to distinguish between capital additions and operating expenses, and renewals and repairs, and to determine the accounts to which all such expenditures shall be allocated. The board may supervise reserves for personal injury claims and require any excess of such reserves over reasonable necessities to be divided and fifty-five per cent thereof paid into the traction fund. Subject to review by the courts, such board may even supervise the salaries of the officers of the companies themselves. Jurisdiction over so many items that are expenses of the companies' organization and operation manifests clearly the intention not to permit the City's share in the net receipts to be reduced by any expenditures except those approved by the Board of Supervising Engineers.

We are therefore of the opinion that the advertising expenses listed in the present order, or any other items of operating expense, would be properly chargeable to the joint account under the authority of the Settlement Ordinances only if the Board of Supervising Engineers first approved such items.

Having reached the conclusion that the Settlement Ordinances do not authorize any of the expenditures now presented to be charged to the joint account, we are further of the opinion that the City Council has no authority by passage of the pending order to allow such expenditures to be charged to said joint account or to waive strict compliance by the companies with the Settlement Ordinances in accounting for the traction fund. To allow improper charges to be made to the joint account is in effect to take from the traction fund

fifty-five per cent of the amount of such expenditures and to use the same for whatever purposes originally caused the expenditures so charged. The funds of municipal corporations must always be devoted to public municipal purposes. *McQuillin, Municipal Corporations*, Sec. 2169; *Fulton v. Northern Illinois College*, 158 Ill. 333; *English v. People*, 96 Ill. 566; *Mather v. City of Ottawa*, 114 Ill. 659. Special funds for designated public uses must be used only for the special purposes designated, and cannot be diverted to any other public uses—a *fortiori* they cannot be donated to the private benefit of any person or corporation or used for non-public, non-municipal purposes, no matter how humane and laudable such purposes may be. *McQuillin, Municipal Corporations*, Sec. 2179; *Water Commissioners v. Hall*, 98 Ill. 371; *People v. Hummel*, 215 Ill. 71; *Barsaloux v. City of Chicago*, 245 Ill. 598.

The traction fund is such a special fund, and its appropriate and (possibly) only use is to provide new, better or additional means of transportation within the City of Chicago. The expenditures now presented for allowance by the Chicago Surface Lines (not being considered operating expenses deducted before the amount due to the traction fund is determined) have not the remotest connection with any use or purpose for which the traction fund can properly be expended. *Barsaloux v. City of Chicago*, 245 Ill. 598.

In this connection we respectfully call attention to the fact that the City Council in the years 1916 to 1920 approved like contributions, as follows:

July 10, 1916—Council Journal, pp. 1329, 1415..	\$ 6,000
Nov. 26, 1917—Council Journal, p. 1546.....	17,750
Feb. 15, 1918—Council Journal, p. 2064.....	2,700
Feb. 27, 1918—Council Journal, p. 2209.....	1,000
May 6, 1918—Council Journal, p. 44.....	2,590
Jan. 20, 1919—Council Journal, p. 1486.....	24,150
Feb. 5, 1920—Council Journal, p. 1946.....	5,040
Total	\$59,230

In our opinion the City Council was without authority to approve or authorize such expenditures, and the City may recover from the companies 55 per cent of such amounts so unlawfully charged.

It has been urged that such acts of the City Council are binding upon the City as a construction of the Settlement Ordinances. Numerous decisions establish the principle that when a contract is ambiguous or doubtful and admits of more than one interpretation consistent with the general meaning of the language used, the acts of the parties may be referred to as a contemporaneous construction of such contract showing the specific meaning intended. We think that the principle is not applicable to the facts now presented and does not affect the right of the City to deny the allowance of the expenditures listed in the pending order. While the term "expenses of operation" is a term of broad and general meaning, no reasonable construction thereof can include most of the items now presented, and the ordinances themselves vest in the Board of Supervising Engineers the right and authority to decide such questions concerning expenses of operation as may arise in the ordinary course of engineering and accounting practice.

We conclude, therefore, that the City Comptroller should be directed not to allow the deduction of any of the items of expense presented unless the Board of Supervising Engineers shall approve the advertising expenditures, which may then be allowed.

Respectfully submitted,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

Construction of Zoning Ordinance in Relation to Proposed Theater at Hyde Park Boulevard and Blackstone Avenue.

December 29, 1924.

HON. FRANK E. DOHERTY, Commissioner of Buildings.

Dear Sir:

In pursuance of a conference held in your office recently at which was discussed the propriety of authorizing Messrs. H. Schoenstadt & Son to proceed with the work of erecting a building to be used for theater, store and hotel purposes at Hyde Park boulevard and Blackstone avenue under Section 24 of the Zoning Ordinance, we submit the following:

A permit for the building in question was originally taken out on March 6, 1920. The notation of the building inspector on same dated March 10, 1920, indicates that excavation was in progress. The permit was extended on September 10, 1920. Under date of January 14, 1921, the building inspector noted thereon that work was at a standstill, foundation partly in. Another extension was granted on April 12, 1921, and under date of May 4, 1921, the same building inspector who made the last report noted that work had not started. The next extension was on October 10, 1921. There are four notations on this by building inspectors, all to the effect that the work was not started. After that there was no other extension taken out until one was granted under date of August 7, 1923; that was again extended February 4, 1924; and finally extended on August 2, 1924. On each of the last three a notation appears to the effect that the work had not started.

It is now claimed that although this permit was first taken out on March 6, 1920, and there was a gap extending from October 10, 1921, to August 7, 1923, wherein no exten-

sion was taken out, and the Zoning Ordinance was passed during that period, that the issuance of the last three extensions constitutes a right which is controlled by Section 24 of the Zoning Ordinance.

The question presents itself in two distinct aspects. First, whether a valid extension could be made on August 7, 1923; second, whether, in case this extension is held to be valid, the work may now proceed thereunder, in the face of the fact that the place where the building is to be erected is zoned for apartment house purposes. The writer is informed that the enterprise projected by the parties who secured the permit is a very large one, involving a great deal of money, and in addition thereto the questions of law are complicated and call for very careful consideration. There is no authority either in text books or decisions of the reviewing courts which can be looked to for guidance on the points at issue. The whole matter is purely one of interpretation of the language used.

The original permit was issued under Section 229 of The Chicago Code of 1911, which is substantially the same as Section 430 of The Chicago Municipal Code of 1922. Practically the only change between the two is that in the latter code the fee for the extension is 25 per cent of the original cost of the permit instead of 10 per cent, and there is a proviso fixing a minimum fee of \$2. The code of 1922 went into effect on December 31, 1922, but so far as the writer has been able to ascertain there were no changes between the code of 1911 and the code of 1922 which would affect the status of the permit. Hence, for all practical purposes, we might consider the same ordinance to have been in force up to the time that the Zoning Ordinance was passed in April, 1923.

Section 229 of the code of 1911 is as follows:

“229. PERMITS—WHEN REQUIRED—LIMITATIONS OF TIME FOR.) Before proceeding with the erection, enlargement, alteration, repair or removal of any building or structure in the city, a permit for such erection, enlargement, alteration, repair or removal shall first be obtained by the owner or his agent from the commissioner of

buildings, and it shall be unlawful to proceed with the erection, enlargement, alteration, repair or removal of any building or of any structural part thereof within the city unless such permit shall first have been obtained from the commissioner of buildings. And if after such permit shall have been granted, the operations called for by the said permit shall not be begun within six months after the date thereof, or if such operations are not completed within a reasonable time, then such permit shall be void, and no operations thereunder shall be begun or completed until an extended permit shall be taken out by the owner or his agent, and a fee of ten per cent of the original cost of permit shall be charged for such extended permit."

The provisions of the above section seem to be quite plain. There are two conditions under which a permit becomes void. If no work whatever has been started within six months after the date of issue the permit lapses. It also lapses in case work is done at so slow a rate of speed that the operations are not completed within a reasonable time. Both of the provisions are undoubtedly intended to prevent parties from securing permits long before there is a bona fide intention to build anything in order to circumvent or evade the provisions of prospective ordinances. The period of extension must, of course, be limited to six months. It cannot exceed the period of the original privilege unless there is express provision in the law to that effect. This is self evident, since otherwise a party could take out a permit and then extend it for an indefinite lease of life thereon.

In interpreting Section 229 the Law Department has been disposed to be liberal. If the period of six months expired and the party came in within some short time afterwards and asked for an extension it has always been the policy to grant such an extension without holding such party too strictly to the letter of the ordinance, unless in the meanwhile there was a change in other parts of the building ordinances which altered the status. The theory under which such extensions were granted was that a party in such a case could apply for an entirely new permit and would be entitled to

one if he paid the full fee. Consequently, the matter resolved itself into a question of whether he should pay the full permit fee or receive an extension at the reduced rate. Such being the case, the Building Commissioner was advised that it would be putting a party to an unnecessary hardship and expense if he was refused an extension merely because he was a little late in applying for it. In the instant case we do not consider it important that the first and second extensions were granted after a period of more than six months had elapsed. The third extension was within six months of the second extension. After that, however, there was a lapse of nearly twenty-two months, and in the meanwhile the Zoning Ordinance was passed and the status of the whole situation was changed. We do not believe it was proper, in view of these facts, to issue an extension under date of August 7, 1923. These parties had not saved their rights by securing an extension in time, and in addition thereto the work had not been started and could not be finished within a reasonable time as contemplated by ordinance. Whatever may have been the cause for this cannot at this time be considered. In an enterprise of such great magnitude the failure to keep a permit in force when there is only a trifling expense involved cannot be excused.

We are met, however, by an argument to the effect that since there was an extension granted prior to the passage of the Zoning Ordinance, even though it may have been a year and a half before, still the permit was out and Section 24 of that ordinance must apply. That section reads as follows:

“Section 24. COMPLETION AND RESTORATION OF EXISTING BUILDINGS.) Nothing herein contained shall require any change in the plans, construction or intended use of a building for which a building permit has been heretofore issued and the construction of which shall have been diligently prosecuted within one year of the date of such permit, and the ground story of which, including the second tier of beams shall have been completed within such year and which entire building shall be completed according to such plans as filed within three years from the date of the passage of this ordi-

nance; provided the time shall be extended for not to exceed one year, or in cases where one such extension may have been granted the time shall be further extended for one year within which such ground story framework, including the second tier of beams shall be completed in any case where actual construction or fabrication was begun early enough to allow, under the then existing conditions, adequate time for completion as above specified and were such construction or fabrication was diligently prosecuted and where such completion has been prevented by conditions impossible to foresee and beyond the control of the owner or builder. Nothing in this ordinance shall prevent the restoration of a building or an advertising sign destroyed by fire, explosion, act of God or act of the public enemy, not in excess of 50 per cent of the value of the building, or prevent the continuance of the use of such building or part thereof as such use existed at the time of such destruction of such building or part thereof or prevent a change of such existing use under the limitations as hereinbefore provided."

Practically the only point that can be raised which affects the situation concerning the life of the permit arises from the fact that there were three extensions issued as above set forth after the passage of the Zoning Ordinance. While this does not affect the legal status, it might under certain conditions have worked an equitable estoppel. We do not think that can be urged in the present instance because work was not begun under the permit. Hence, if we are to assume that there was a permit in force at the time of the passage of the Zoning Ordinance, the question resolves itself into one of interpretation without any equitable problems.

It is admitted that the parties to whom the permit was issued are not within the exception providing for the completion of a building that appears in Section 24 before the proviso. But it is claimed that the proviso grants an extension for one year under certain conditions and for an additional year under certain other conditions. This is perhaps the most difficult legal question in the whole matter, because there is some ground for arguing that the words "further ex-

tended" apply only in case there has already been one extension under the Zoning Ordinance.

We are convinced, however, that the period of one year is the only latitude that was contemplated by the proviso in question. It is hard to conceive of any reason for making such a provision in a disjointed manner by providing, first, that the time shall be extended for not to exceed one year under certain conditions, and then by saying that in cases where one such extension may have been granted the time shall be further extended for another year. There can be no reason for the double postponement when it could be much better expressed by simply allowing two years. What actually was the intention of the City Council was to provide for an extension of one year in all cases, but provision had to be made for parties who had already received an extension of one year. In other words, the part of the section which appears before the proviso says that nothing in the ordinance contained should work against a party who has diligently prosecuted the work within one year of the date of his permit and completed a certain portion of the building. But, if he had not done this he was to be given a year within which to do it, and in case this year had already been consumed when the ordinance was passed he was to be given another year. The section bears evidence on its face of having been altered twice in order to fit situations that existed at the time. It was altered in the first place to permit persons who had failed to complete their buildings to finish them, and then again altered so as to permit persons who had already had one extension to come within the same class. Any other construction of the ordinance would do violence to the language used.

The only other point that has been suggested as possibly preserving the rights of the parties who took out the permit is the substitution of the word "or" in place of the word "and" just before the last clause of the proviso, so that an extension would be permissible where the completion was prevented by conditions impossible to foresee and beyond the control of the owner or builder. We do not think there is

much force in this contention, since it is coupled up with a provision that the construction or fabrication was diligently prosecuted, which is admittedly not the case here.

We are therefore constrained to hold that in our opinion the extension which was granted by the Commissioner of Buildings under which it is claimed that parties have now the right to proceed was improvidently issued and that these parties must conform to the changed status brought about by the enactment of the Zoning Ordinance.

Yours very truly,

LEON HORNSTEIN,
First Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,
Corporation Counsel.

Extensions and Additions to Platforms, Transfer Stations, Stairways and Tracks of Elevated Railroads.

February 18, 1925.

HON. A. A. SPRAGUE, Commissioner of Public Works.

Dear Sir:

We beg leave herein to reply to your verbal request for advice relative to the application of the Chicago Rapid Transit Company to the Commissioner of Public Works for permits covering the construction of, (1) extensions of various station platforms outside the "Union Loop," (2) extensions of platforms at certain stations on the "Union Loop," (3) additional transfer bridges at certain stations on the "Union Loop," (4) additional stairways at certain stations on the "Union Loop," and (5) a third track on West Lake street

from North Crawford avenue to North Laramie avenue ($1\frac{1}{2}$ miles) and from North Ashland avenue to North Rockwell street (about $1\frac{1}{4}$ miles).

The authority of the Commissioner of Public Works to issue such permits depends entirely on the terms of the elevated ordinances. If the right of the company to have such permits or any of them can be clearly shown, a writ of mandamus would compel the commissioner to issue them. If the right to do the work to be covered by such permits has not been granted by the elevated ordinances, the commissioner, of course, has no right to issue the permits and their issuance would convey no authority. The City Council alone can authorize new work and new privileges.

Section 4 of the ordinance granted by the City Council to the Union Elevated Railroad Company on October 14, 1895, contains the following provisions relative to stations, platforms, stairways and means of ingress and egress to and from the elevated railroad to be constructed thereunder.

“The Union Elevated Railroad Company shall have permission and authority, and the same are hereby given and granted to it, to construct and maintain in the route hereby authorized, all necessary or proper stations, platforms and depot stations, and to connect the same with Wabash avenue, by means of all necessary stairs, stairways, elevators, landing places and other constructions and appliances for ingress, egress and the accommodation of passengers; but such platforms, stations, stairs, stairways, elevators, landing places, etc., shall be so constructed and maintained as not to unnecessarily impair the usefulness of such avenue, or any portion thereof. Neat and commodious passenger stations of easy and convenient access shall be provided. * * * The permission and authority to locate, construct and maintain all such requisite platforms, landings and lines of stairs leading to and from the sidewalks of the street and avenue, and the said elevated stations being herein expressly granted said company, whenever and wherever such methods of reaching said stations may be found necessary. * * * The plans and specifications of such depots, platforms and stairs shall be submitted to and approved by the commissioner of public works be-

fore the work of construction thereof shall be commenced.’’

Said ordinance of October 14, 1895, authorized the construction of the Wabash avenue side of the “Union Loop” from East Lake street to East Harrison street. Practically identical language is contained, however, in all the major ordinances which authorized the construction of the different parts of the elevated railroad system by different grantee companies.

The above quoted language as the same appears in each major ordinance contains all the general authority granted by the City Council in respect to the construction of stations, platforms, stairways, etc., at stations on the “Union Loop” or authorizing the Commissioner of Public Works to issue permits for such construction work to be done at “Union Loop” stations by the elevated railroad companies. The Through Route Ordinance of July 28, 1913, and the Platform Ordinance of January 26, 1914, granted specific authority for the extension of certain named platforms at stations on the “Union Loop” and the building of designated additional stairways, but contained no general grant of authority for the extension of such “Union Loop” platforms or the building of additional stairways.

By Section 1 of the Platform Ordinance of January 26, 1914, the east and west platforms at the station at South Wabash avenue and East Adams street are limited to a maximum length of 575 feet each. At said station the existing west platform is 569.66 feet in length and the existing east platform is 675.32 feet in length. The present application is for permits to extend said platforms to a total length of 780.98 feet each.

Section 5 of the ordinance of October 1, 1894, which authorized the construction of the elevated railroad on Lake street from North Market street to North Wabash avenue, including, therefore, the Lake street side of the “Union Loop,” limited the north and south platforms at the stations at the intersection of North state street and East and West Lake

streets and at West Lake street and North Clark street to not more than 180 feet in length, respectively. Said ordinance limitation has never been amended or repealed and the ordinances of July 28, 1913, and January 26, 1914, above referred to, did not provide for platform extensions at said stations. Nevertheless, the north platform at the State street station is now 328.53 feet in length; the south platform at said station is 276.78 feet in length; the existing north platform at the Clark street station is 351.15 feet in length; and the existing south platform at said station is 251.11 feet in length. The present application is for permits to extend the south platforms at said stations to the same length as the respective north platforms.

Section 4 of said Through Route Ordinance of July 28, 1913, contains the following general provisions concerning extensions of elevated platforms at stations outside the "Union Loop," provided, however, the maximum length of said platforms when and as extended shall not exceed 330 feet:

"Each of said four companies is hereby authorized to construct and maintain extensions of the platforms of each of its stations on all its lines of railroad within the city of Chicago (exclusive of the Union Loop) so as to make the total length of each platform not more than three hundred and thirty (330) feet, to enable it to accommodate a seven car train at each such station, and is hereby authorized to make such re-alignment of its tracks and such structural changes at each such station as may be necessary or convenient for the construction and maintenance of the extended platforms."

The present application for permits covering the extensions of elevated platforms at stations outside the "Union Loop" shows the total length of all such platforms when and as extended to be not more than 330 feet, except that it is stated that the total extended length of the west platform at the station at East Congress street and South Wabash avenue is to be 345.30 feet being therefore 15.30 feet more than the maximum platform length provided for in said Section 4 of the Through Route Ordinance.

Prior to the passage of said ordinances of July 28, 1913, and January 26, 1914, transfer bridges were not used in the construction of the elevated railroad stations, although at some stations subway passages had been provided under the elevated tracks for the benefit of persons desiring to pass from the station on one side of the elevated railroad structure to the station on the other side. In all cases, however, said stations were operated by different companies, and persons using said subways from one station to another were obliged to pass directly through each station and pay additional fare in order to have access to the trains at the second station. Said ordinances of 1913 and 1914 provided for the building of certain named transfer bridges, but did not contain any general authority for the building and maintenance of such structures. All authority for the issuance of the permits for transfer bridges now asked for must therefore be found in the general language relative to stations, platforms, stairways, etc., first above quoted.

Section 7 of said Through Route Ordinance of July 28, 1913, contains the following language relative to the construction of a third track on the elevated railroad on West Lake street:

“The Oak Park Company (*i. e.*, Chicago and Oak Park Elevated Railroad Company) is hereby authorized to construct, maintain and operate a third track upon all or any portion of its elevated railroad structure located between North 40th avenue and North 52nd avenue, and upon all or any portion of its elevated railroad structure located between Rockwell street and North Ashland avenue.”

The North 40th avenue and North 52d avenue named in said Section 7 are now the North Crawford avenue and North Laramie avenue referred to in the present application for permits.

The present application is in the name of the Chicago Rapid Transit Company, which claims to have the rights and privileges formerly possessed by the several elevated railroad companies which were the grantee companies of the

various elevated railroad ordinances or successors to said grantee companies. Said Chicago Rapid Transit Company claims to be a corporation formed by the consolidation of the South Side Elevated Railroad Company (successor to the Chicago and South Side Rapid Transit Railroad Company), the Northwestern Elevated Railroad Company, and the Metropolitan West Side Elevated Railway Company. It also claims to possess through transfer and assignment the rights and privileges of the Chicago and Oak Park Elevated Railroad Company (successor to the Lake Street Elevated Railroad Company). The City Council has not as yet recognized the right of said Chicago Rapid Transit Company to succeed to the rights and privileges or any of them granted to the original elevated railroad companies or possessed by any recognized successors of such original companies. It is therefore suggested that whatever permits are issued to said company be stamped with the reservation contained in the opinion of the Law Department to the Commissioner of Public Works, dated May 21, 1924, relative to the relocation of a stairway at the station at East Adams street and South Wabash avenue.

Very truly yours,

C. M. DOTY,

Assistant Corporation Counsel.

Approved:

FRANCIS X. BUSCH,

Corporation Counsel.

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